A Comparative Analysis of Mediation

by Examination and Critique of the Theory and Practice thereof in Germany, Scotland and Switzerland

Dominik Helmut Carle

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School of Law
University of Glasgow

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Abstract

Mediation is a special form of alternative dispute resolution which is becoming more and more popular. This thesis is concerned with the development of the legal framework and the practical use of mediation in Germany, Scotland and Switzerland.

To harmonize the rules on mediation within the European Union, Directive 2008/52/EC was created imposing mandatory standards on certain aspects of mediation. The Directive is binding only in respect of cross-border dispute mediations (i.e. where at least one of the parties to the dispute is domiciled or habitually resident in a Member State other than that of any other party), but its provisions may also be applied to internal dispute mediation processes.

This led to the monistic approach on the one hand, where a legislation system simultaneously seeks to regulate both internal dispute and cross-border dispute mediations and thus treats them equally, and the dualistic approach, on the other hand, where cross-border dispute mediations are regulated separately, and thus internal dispute and cross-border dispute mediations may be treated differently.

In particular, this thesis is concerned with the question whether the distinction between internal dispute and cross-border dispute mediations drawn by Directive 2008/52/EC complicates the harmonization of the rules on mediation.

The implementation of Directive 2008/52/EC by the monistic approach in Germany, and by the dualistic approach in Scotland, and the autonomous handling of mediation legislation in Switzerland (which is not a Member State of the European Union and thus not bound by Directive 2008/52/EC) show different patterns of development with regard to mediation in Europe. The comparison among those different developments (regarding domestic dispute mediation and cross-border-dispute mediation) finally answers the question whether Directive 2008/52/EC in its current form was appropriate.

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Author`s Declaration

I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature

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Printed Name Dominik Helmut Carle

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Chapter 1: Introduction

When two people wish to carry out acts which are mutually inconsistent a conflict exists.[1] Not every conflict has to turn into a legal dispute, but every unsolved conflict imports the risk of turning into such a dispute.[2]

To solve their dispute, parties may appeal to any kind of authority.[3] Such forms of conflict resolution, traditionally performed by a judge or jury in a trial, may be designated as litigation.[4] Recently, alternative dispute resolutions have coexisted with the traditional judicial rules on the settlement or determination of disputes. Mediation is one such form of alternative dispute resolution.[5]

Mediation as a concept has a very long history, and even the thoughts of the Chinese philosopher Confucius could be seen to be an early form of mediation.[6] Since those early days mediation has developed considerably and nowadays it is becoming more and more attractive all over the world and especially in Europe.

On 15 and 16 October 1999 the European Council at its meeting in Tampere "called for alternative, extra-judicial procedures to be created by the Member States."[7] As a result of the growing interest in alternative dispute resolution and at the request of the European Council, in April 2002 the European Commission published a Green Paper on alternative dispute resolution in civil and commercial law,[8] "to initiate a broad-based consultation" about alternative dispute resolution in civil and commercial law.[9] Several consultations

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[1] M. Nicholson, *Rationality and the Analysis of International Conflict,* Cambridge Studies in International Relations, Book 19, (Cambridge, 1992), 11.

[2] D. H. Yarn (ed.), *Dictionary of Conflict Resolution,* "Conflict", (San Francisco, 1999), 115.

[3] H. M. Rebach, *Mediation and Alternative Dispute Resolution*, in: Handbook of Clinical Sociology, 2nd Edition, (Dordrecht, 2001), 198.

[4] D. Strempel, *Vom Sühne- und Güteverfahren zur Mediation,* (Hagen, 2001), 17.

[5] A. J. Stitt, *Mediation: A Practical Guide,* (London, 2004), 5.

[6] Rebach, 198.

[7] Directive 2008/52/EC, Recital (2).

[8] Green Paper on alternative dispute resolution in civil and commercial law, Commission of the European Communities, Brussels, 19.4.2002, EU: COM (2002) 196.

[9] Ibid., 4.

took place, and as one result, in July 2004 the European Commission organized the launch of a Code of Conduct for Mediators "which sets out a number of principles to which individual mediators may voluntarily decide to commit themselves, under their own responsibility...in all kinds of mediation in civil and commercial matters" and "adherence to the code of conduct is without prejudice to national legislation or rules regulating individual professions."[10]

As another result, in October 2004 the European Commission submitted to the European Parliament and the Council a proposal for a directive on certain aspects of mediation in civil and commercial matters.[11]

On 21 May 2008 the European Parliament and the Council created a directive on certain aspects of mediation in civil and commercial matters, Directive 2008/52/EC. As with any other directive, it sets out binding results for every European Union Member State to which it is addressed, but leaves "to the national authorities the choice of form and methods" of implementation.[12] This directive includes mandatory standards ensuring the quality of mediation, the enforceability of agreements resulting from mediation, the effect of mediation on limitation and prescription periods and the confidentiality of mediation,[13] but it sets out binding results only for "cross-border disputes".[14] A "cross-border dispute" in this context "shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party" within the mediation.[15] Although Directive 2008/52/EC is binding only in respect of cross-border disputes,[16] the European Parliament and the Council explicitly announced that "nothing should prevent

[10] cf. European Code of Conduct for Mediators, 02.07.2004, Preface.

[11] Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, Commission of the European Communities, Brussels, 22.10.2004, EU: COM (2004) 718.

[12] Treaty on the Functioning of the European Union, Article 288.

[13] Directive 2008/52/EC, Article 4-8.

[14] Ibid., Article 1 (2).

[15] Ibid., Article 2 (1).

[16] Ibid., Article 1 (2).

Member States from applying …(those)… provisions also to internal mediation processes."[17]

A Member State may already have had national regulations broadly in accordance with Directive 2008/52/EC and thus did not need to implement this directive. Those regulations might apply, on the one hand, to any mediation (cross-border dispute mediation and domestic dispute mediation) or, on the other hand, they might apply only to cross-border dispute mediation. Then there might or might not be additional regulations about domestic dispute mediation.

Furthermore, a Member State may already have had national regulations about mediation, but not in accordance with Directive 2008/52/EC. In such cases, it would have been necessary to implement Directive 2008/52/EC. This implementation might also, on the one hand, apply to any mediation (cross-border dispute mediation and domestic dispute mediation) or apply only to cross-border dispute mediation on the other hand. Then again there might or might not be additional regulations about internal mediation.

Last but not least, a Member State may not have had regulations about mediation at all. In such a case, it was necessary to implement Directive 2008/52/EC, which might also on the one hand apply to any mediation (cross-border mediation and internal mediation) or only apply to cross-border mediation on the other hand.

The positions of Member States can be narrowed down to two main different approaches: the monistic approach, and the dualistic approach.

Any legislation dealing not only with cross-border disputes, but regulating simultaneously both domestic disputes and cross-border disputes can be called the "monistic approach".[18] Thus, the result of a monistic approach is an equal (monistic) treatment of cross-border disputes and domestic disputes.

Any legislation solely concerning mediation of cross-border disputes and not regulating domestic disputes can be called the "dualistic approach",[19] because the result of this

[17] Directive 2008/52/EC, Recital (8).

[18] cf. C. Esplugues, *Civil and Commercial Mediation in the EU after the transposition of Directive 2008/52/EC*, in: C. Esplugues (ed.), Civil and commercial Mediation in Europe, Cross-Border Mediation, Volume II, (Cambridge, 2014), 546 et seq.

[19] Ibid., 546 et seq.

dualistic approach will be a different (dualistic) treatment of mediation of cross-border disputes, and domestic disputes, respectively.

Germany is an example of a Member State of the European Union that has transposed Directive 2008/52/EC into a national law exclusively concerned with mediation and dealing not only with cross-border disputes, but also internal/domestic disputes.[20] Therefore Germany chose the "monistic approach" to implement Directive 2008/52/EC.

In Scotland, by contrast, there is to date "no primary legislative basis" regulating mediation.[21] Secondary legislation, however, has been introduced to implement Directive 2008/52/EC solely concerning cross-border mediation and leaving untouched and applicable the prior existing legal solutions on internal mediation.[22] Therefore Scotland chose the "dualistic approach" to implement Directive 2008/52/EC.

The "final goal of the 2008 Directive is to reach a highly … harmonized set of rules on mediation …"[23], so that "parties having recourse to mediation can rely on a predictable legal framework".[24]

Already the two examples of Germany and Scotland show different ways of implementation by using the monistic approach on the one hand and the dualistic approach on the other. Furthermore, the dualistic approach may have led to internal differences between the legal backgrounds of cross-border mediation and domestic mediation.

These different approaches would have been avoided if Directive 2008/52/EC had been binding not only in respect of cross-border disputes, but also in relation to domestic disputes.

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[20] Mediationsgesetz vom 21.7.2012, (German Mediation Act).

[21] cf. E. B. Crawford and J. M. Carruthers, *United Kingdom*, in: C. Esplugues and J. L. Iglesias and G. Palao (ed.), Civil and Commercial Mediation in Europe, National Mediation Rules and Procedures, Volume I, (Cambridge, 2013), 516.

[22] Cross-Border Mediation (EU Directive) Regulations 2011, and Cross-Border Mediation (Scotland) Regulations 2011.

[23] Esplugues, Volume II, 510.

[24] Directive 2008/52/EC, Recital (7).

This leads to the following hypothesis:

Directive 2008/52/EC would have better harmonized the rules on mediation in Europe, if it had not drawn the distinction between internal and cross-border disputes.

To research this hypothesis, this thesis will seek to identify differences and similarities in the rules on mediation in Europe (within and without the influence of Directive 2008/52/EC). The thesis will evaluate if or how differences could have been avoided and (if such further harmonization was possible) if this was appropriate.

To show the impact of Directive 2008/52/EC on the law of mediation as regards domestic disputes (to which Directive 2008/52/EC does not apply, but might have a practical impact at least where the monistic approach has been chosen to the implementation), this thesis will examine the domestic laws of mediation in Germany and Scotland, as an EU Member State, and territorial unit within an EU Member State, respectively, which have adopted different approaches to the implementation of Directive 2008/52/EC. In order to show the legal landscape of mediation in a non-EU Member State (and therefore one which is not bound by Directive 2008/52/EC), the domestic law of mediation in Switzerland will also be examined. This chapter will also compare the different domestic laws of mediation (Chapter 2).

Secondly, this thesis will examine the law of mediation as regards cross-border disputes in Germany, Scotland (under the direct influence of Directive 2008/52/EC) and Switzerland. The different laws as regards cross-border disputes will also be compared (Chapter 3).

Thirdly, this thesis will compare domestic dispute mediation to cross-border dispute mediation within the same legal system (Chapter 4).

Then, this thesis will draw a conclusion from the previous results and evaluate the different approaches (to the implementation of Directive 2008/52/EC and to the autonomous handling in Switzerland). Thereby the hypothesis, whether Directive 2008/52/EC would have better harmonized the rules on mediation in Europe, if it had not drawn the distinction between internal and cross-border disputes, will be verified or rejected. Finally, this thesis will show whether the distinction between domestic and cross-border disputes is appropriate or should be avoided (Chapter 5).

Chapter 2: Mediation under the Domestic Laws of Germany, Scotland and Switzerland

In this Chapter the domestic laws of mediation in Germany, Scotland and Switzerland will be examined to show differences or similarities and to demonstrate the development of the domestic laws with and without the (indirect) impact of Directive 2008/52/EC.

2.1 Germany

In Germany traditionally there have been three main forms of mediation: mediation totally independent of court procedure (out-of-court mediation); mediation initiated by court procedure but conducted by a person independent of the court (court-annexed-mediation); and mediation during court procedure, conducted by a judge (judicial mediation).[25] Until recently, all these forms of mediation were not regulated properly by law,[26] but on 21 July 2012 the situation changed with the introduction of the German Mediation Act.

2.1.1 Out-of-court Mediation

Mediation in Germany originally was independent of court procedure. This out-of-court mediation was not regulated, and there was no binding definition of mediation until the Mediation Act of 21 July 2012 created new legal regulations for out-of-court mediation.[27]

The Mediation Act defines "mediation" as a "confidential and structured process in which parties strive, on a voluntary basis and autonomously, to achieve an amicable resolution of their conflict with the assistance of one or more mediators."[28] Every process that fulfils this

[25] Gesetzentwurf der Bundesregierung zum Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung, 1.

[26] M. Ahrens, *Mediationsgesetz und Güterichter – Neue gesetzliche Regelungen der gerichtlichen und außergerichtlichen Mediation*, in: Neue Juristische Wochenschrift (NJW) 2012, 2. Halbband, Heft 34, 2465 – 2474, (München, 2012), 2465.

[27] Ahrens, 2465.

[28] German Mediation Act, Section 1 (1).

definition falls within the regulation of the Mediation Act, no matter whether the parties involved are aware of engaging in mediation.[29]

Mediation has always been a confidential and structured process which leads to a consensual form of dispute resolution where solutions are developed voluntarily by the parties under their own responsibility in negotiations, with the support of an independent third party, the mediator.[30] The traditional forms of out-of-court mediation fall within the regulations of the new Mediation Act. For example, the Act describes the process and the tasks[31] and the initial and further training of the mediator.[32]

Recently, not only has the Mediation Act been created, but also the German Code of Civil Procedure has been extended to incorporate some sections about mediation.[33] A Code of Civil Procedure regulates court proceedings and so one should expect that those sections should not influence out-of-court mediation. Sometimes, however, for example about the enforceability of agreements resulting from mediation,[34] they do.

2.1.1.1 Mediator

Before the Mediation Act, there was no legal definition of "mediator" in Germany. Now a mediator is defined as "an independent and impartial person without any decision-making power who guides the parties through the mediation".[35]

The Mediation Act also regulates the requirement of training of the mediator.[36]

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[29] Ahrens, 2467.

[30] cf. K. von Schlieffen and R. Ponschab and U. Rüssel and T. Harms, *Mediation und Streitbeilegung, Verhandlungstechnik und Rhetorik*, Juristische Weiterbildung, (Berlin 2006), 20.

[31] German Mediation Act, Section 2.

[32] Ibid., Section 5.

[33] c.f. German Code of Civil Procedure, Section 278 a (2).

[34] Directive 2008/52/EC, Article 6.

[35] German Mediation Act, Section 1 (2).

[36] Ibid., Section 5.

2.1.1.2 Training of the Mediator

Formerly, in consequence of the absence of a legal definition of "mediator" in Germany anyone could act as a mediator without the need for accreditation, qualifications or training. Now, section 5 of the Mediation Act regulates the "initial and further training of the mediator".

> The mediator himself shall be responsible for ensuring that, by virtue of appropriate initial training and regular further training, he possesses the theoretical knowledge and practical experience to enable him to guide the parties through mediation in a competent manner. Suitable initial training shall impart the following in particular:
>
> 1. knowledge about the fundamentals of mediation as well as the process and framework conditions therefor,
>
> 2. negotiation and communication techniques,
>
> 3. conflict competence,
>
> 4. knowledge about the law governing mediation and the role of the law in mediation, and
>
> 5. include practical exercises, role play and supervision.[37]

All requirements mentioned are not clearly defined and are not always a mandatory feature of the training as they just "shall" be included in the education. "Shall" in German Law means that those regulations are mandatory in usual situations, but exceptions are also possible whenever a special situation requires a different approach. Thus, those regulations are not mandatory in every case. Even now, these regulations are very "general and vague"[38] to protect existing mediators and enable them to still practise after the Mediation Act.[39]

Furthermore, it is (just) the mediator's own responsibility to ensure that he has received an appropriate training.[40] No formal accreditation is required and still there is no unified standard in the education of mediators, so an inferior education has no consequences or

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[37] German Mediation Act, Section 5 (1).

[38] cf. I. Bach and U. P. Gruber, *Germany*, in: C. Esplugues and J. L. Iglesias and G. Palao (ed.), Civil and Commercial Mediation in Europe, National Mediation Rules and Procedures, Volume I, (Cambridge, 2013), 168.

[39] Ahrens, 2468.

[40] German Mediation Act, Section 5 (1).

sanctions per se. Thus, even with the Mediation Act, in practice there have been no changes at all so far in view of formal education requirements for a mediator.

2.1.1.3 Certified Mediator

The German lawmakers, aware of the problem of inadequate training, created the new title "Certified Mediator". [41] Any person who has completed mediator training and who complies with regulations issued pursuant to section 6 of the Mediation Act may use the designation "Certified Mediator". The Mediation Act authorised the Federal Ministry of Justice to issue regulations governing the training and continuing education of Certified Mediators,[42] but those regulations do not exist so far, just a (first) draft for such regulations has been created.[43] In practice, therefore, the title "Certified Mediator" is not in use yet.

Even when those regulations are implemented and the title "Certified Mediator" is in use, it will not have any legal consequences. A "Certified Mediator" will not have more legal powers than an uncertified mediator; "Certified Mediator" will just be a designation. The goal is to achieve an equal education in practice because of the promotional effect of this title.[44]

However, since the advent of the Mediation Act, any mediator has been obliged, upon request of the parties, to inform them of his professional or technical background, his education, and his experience in the field of mediation.[45] Therefore the title of a "Certified Mediator" might help inexpert parties to trust in the credentials and qualifications of their mediator.

[41] German Mediation Act, Section 5 (2).

[42] Ibid., Section 6.

[43] cf. Verordnungsentwurf des Bundesministeriums der Justiz und für Verbraucherschutz, Verordnung über die Aus- und Fortbildung von zertifizierten Mediatoren, 31.01.2014.

[44] Ahrens, 2467.

[45] German Mediation Act, Section 3 (5).

2.1.1.4 Person of Mediator

Although the requirements in view of education and training are very general and vague, the Mediation Act imposes mandatory individual requirements on a mediator.

Even before the Mediation Act the requirement of neutrality of the mediator was one of the principles of mediation.[46] Now, the Mediation Act requires the mediator to be an "independent and impartial person".[47] Even more, the Mediation Act requires the mediator to disclose to the parties all facts that could compromise his ability to mediate in an independent and impartial manner.[48] But the Mediation Act also respects the principle of voluntariness,[49] so in most cases the parties can explicitly consent to the mediator after such disclosure.[50]

Normally no person shall act as mediator if another person who "is part of the same professional cooperative or office-sharing arrangement has acted (or will act) for one of the parties in the same matter",[51] but nonetheless the disputing parties involved may give their consent when they have been "given comprehensive information".[52] Someone who represented one of the parties in the subject matter of the mediation prior to the mediation, or who will represent any party in the subject matter of the mediation during or after the mediation, may never serve as mediator himself.[53] This example shows how the German Mediation Act takes care of voluntariness[54] as well as of the mediator being independent and impartial.[55]

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[46] J. Duss-von Werdt, *Einführung in Mediation*, 1st. Edition, (Heidelberg, 2008), 17.

[47] German Mediation Act, Section 1 (2).

[48] Ibid., Section 3 (1).

[49] Ibid., Section 1 (1).

[50] Ibid., Section 3 (1).

[51] Ibid., Section 3 (3).

[52] Ibid., Section 3 (4).

[53] Ibid., Section 3 (2).

[54] Ibid., Section 1 (1).

[55] Ibid., Section 1 (2).

Another principle of mediation has always been the requirement of self-responsibility,[56] so the parties try themselves to reach an agreement on the settlement of their dispute. In this respect two basic opinions existed in the past, the passive and the active mediation.[57] In the passive mediation the mediator was not allowed to influence the content of the mediation result in any way, whereas in the active mediation suggestions for a possible solution were allowed. But even if suggestions were permissible the mediator traditionally never had authority to decide the parties' dispute. Now the Mediation Act requires that the parties act autonomously[58] and that the mediator has no decision-making power.[59]

Traditionally the mediator also had to be impartial.[60] This means that a mediator is not allowed to support just one of the parties. The Mediation Act also requires that the mediator has to be equally beholden to all parties to the mediation.[61]

In summary, the former general principles about the attributes of the mediator are now binding by law by virtue of the Mediation Act.

2.1.1.5 Mediation Procedure

Even before the mediation process begins, there can be an agreement to go to mediation. That means that either by a separate agreement or by a mediation clause the parties oblige themselves to undergo mediation.[62]

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[56] cf. S. Proksch, *Konfliktmanagement im Unternehmen*, Mediation als Instrument für Konflikt- und Kooperationsmanagement am Arbeitsplatz, (Heidelberg 2010), 33.

[57] Schlieffen,Ponschab,Rüssel,Harms, 25 et seq.

[58] German Mediation Act, Section 1 (1).

[59] Ibid., Section 1 (2).

[60] cf. I. Greiter and G. Lochmann and R. Ponschab and A. Schweizer and R. Soudry, *Schlüsselqualifikationen, Kommunikation, Mediation, Rhetorik, Verhandlung, Vernehmung*, 1st. edition, (Köln, 2008), 214.

[61] German Mediation Act, Section 2 (3).

[62] cf. A. Hutner, *Das internationale Privat- und Verfahrensrecht der Wirtschaftsmediation*, Studien zum ausländischen und internationalen Privatrecht, Volume 156, (Tübingen, 2005), 11 et seq.

This mediation has to follow a "structured process" in terms of the Mediation Act.[63] The law does not set any further requirement about how to structure mediation, so any kind of structure is acceptable within the wording of the Mediation Act.[64] Mediation has always been a structured process separated into several phases,[65] so this requirement does not change the practical design of mediation.

In a similar way the Mediation Act says little about the required content of mediation. Mediation has always been a flexible instrument to solve any kind of problems[66] and by convention the parties decide about the content of the mediation depending on the content of the dispute.

Usually mediation starts with an agreement to mediate which includes the concrete content and process of the mediation, the expected costs and other basic criteria.[67] As the German Mediation Act regulates parts of this process, especially with regard to the duties of the mediator, the agreements to mediate can be settled more easily now,[68] because those regulations are binding by law and need not be individually negotiated for each mediation. "The mediator shall satisfy himself that the parties have understood the basic principles of the mediation process and the way in which it is conducted, and that they are participating in mediation voluntarily."[69]

Information has always been a principle of mediation as informed parties will accept the results of the mediation in the future.[70] Therefore the mediator "shall promote communication between the parties and shall ensure that the parties are integrated into the

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[63] German Mediation Act, Section 1 (1).

[64] Ahrens, 2466.

[65] Pöpping, *Wirtschaftsmediation als Verfahren des betrieblichen Konfliktmanagements*, 13; Duss-von Werdt, *Einführung in Mediation*, 55; Greiter and Lochmann and Ponschab and Schweizer and Soudry, *Schlüsselqualifikationen*, 211.

[66] Hutner, 10.

[67] D. Berning and G. Schwamberger, *Wirtschaftsmediation für Steuerberater, Mediation als neues Beratungsfeld*, Steuerpraxis, 1st. Edition, (Wiesbaden, 2008), 34.

[68] Ahrens, 2466.

[69] German Mediation Act, Section 2 (2).

[70] Duss-von Werdt, *Einführung in Mediation*, 21.

mediation process in an appropriate and fair manner."[71] Every participant should act as openly as possible.[72]

Confidentiality about the content of mediation should enable the parties to act openly.[73] Generally, "the mediator and the persons involved in conducting the mediation process shall be subject to a duty of confidentiality unless otherwise provided by law. This duty shall relate to all information of which they have become aware in the course of performing their activity."[74] It seems like a logical consequence of this confidentiality that "only with the consent of all parties can third parties become involved in mediation."[75] Even lawyers or other representatives of the parties are not automatically allowed to join the mediation.[76] Furthermore the mediator is usually subject to a duty of confidentiality by a contract with the parties (usually the agreement to mediate).[77]

The duty of confidentiality by the Mediation Act is just stated in the Mediation Act. But there are no penal consequences if this duty is breached,[78] either by the Mediation Act itself, or by the German Criminal Code.[79] (Further rules of professional conduct, for example if the mediator is also a lawyer, in connection with the German Criminal Code might lead to different results).[80] In practice, if the duty of confidentiality is breached, consequences for the mediator usually (only) arise out of the breach of contract with the parties.

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[71] German Mediation Act, Section 2 (3).

[72] Ahrens, 2466.

[73] Greiter,Lochmann, Ponschab, Schweizer, Soudry, 215.

[74] German Mediation Act, Section 4.

[75] Ibid., Section 2 (4).

[76] Ahrens, 2467.

[77] cf. S. Schneider, *Vertraulichkeit der Mediation, Schutz und Grenzen durch das Straf- und Strafprozessrecht*, 1st edition, (Bremen 2014), 42.

[78] Ibid., 43.

[79] Ibid., 83.

[80] c.f. German Criminal Code, Section 203.

Similarly the parties themselves usually are subject to a duty of confidentiality by contract, either explicitly or conclusively.[81] Thus if the duty of confidentiality is breached by the parties, consequences might also arise out of the breach of contract, such as contractual penalty or compensation.[82]

2.1.1.6 Legal outcomes and aspects of Mediation

Usually successful mediation ends with an arrangement between the parties, fixed in the mediation settlement.[83] Although the mediation and thus the arrangement were settled voluntarily, the question remains how enforceable the mediation settlement could be.

The Mediation Act does not make any statements as to how binding a mediation settlement is.[84] It just says that "the mediator shall make efforts to ensure that the parties conclude the agreement in awareness of the underlying circumstances and that they understand the content of the agreement", with the help of external advisers, if necessary.[85] The Mediation Act does not make any provision as to the form which a mediation settlement ought to take. It just explains that with the consent of the parties, the agreement "may" be memorialised in a settlement document.[86] By implication, such a settlement does not have to be memorialised in a special form. In Germany, contracts in general are binding without any requirement as to formal validity and according to the rules of German contract law "an obligee is entitled to claim performance from the obligor".[87] This requires a settlement of claims by substantive law.[88] A settlement document may help to prove and assert one`s claims.

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[81] Schneider, 75.

[82] German Civil Code, Section 280 et seq.

[83] Proksch, 57.

[84] Bach, Gruber, Volume I, 164.

[85] German Mediation Act, Section 2 (6).

[86] Ibid.

[87] German Civil Code, Section 241.

[88] Hutner, 14.

Furthermore, there are several ways to create a directly enforceable mediation settlement.

One way is to agree in the form of the lawyer's compromise,[89] which is a formal document at the local court. This requires a lawyer for each party which makes it very expensive for the parties and therefore there has not been much practical use of this type of settlement.[90] A similar way to create a directly enforceable mediation settlement is the notarial deed.[91]

A further possibility is to let a pure mediation settlement be transformed into an arbitration award. This gives the parties the chance to settle their dispute in the cooperative way of mediation, but to use the enforceability of arbitral tribunals. Those tribunals shall transform the mediation settlement into an arbitration award upon corresponding application by the parties,[92] rendering the settlement enforceable.

Another issue is the imminent risk of the plea of the statute of limitations when no mediation settlement can be achieved. German lawmakers saw no need to regulate question of limitations especially for mediation.[93] Section 203 of the German Civil Code has always regulated the suspension of limitation in the case of negotiations. This section states that "if negotiations between the obligor and the obligee are in progress…the limitation period is suspended until one party or the other refuses to continue the negotiations. The claim is statute-barred at the earliest three months after the end of the suspension." Mediation is a negotiation in this sense.[94]

As mentioned, mediators must keep confidentiality by law,[95] but the lawmakers did not create an original right to remain silent by regulation of the Mediation Act.[96] The mediator

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[89] German Code of Civil Procedure, Section 796 a et seq.

[90] Ahrens, 2468.

[91] German Code of Civil Procedure, Section 794 (1) No. 5.

[92] Ibid., Section 1053 (1).

[93] Gesetzentwurf (Draft), German Mediation Act, 1.

[94] H. Grothe, *§ 203, Hemmung, Ablaufhemmung und Neubeginn der Verjährung*, in: F. J. Säcker and R. Rixecker (ed.), Münchener Kommentar zum Bürgerlichen Gesetzbuch, 6st. Edition, Volume 1, 2124 – 2214 (München 2012), § 203 comment 5.

[95] German Mediation Act, Section 4.

[96] Ahrens, 2468.

has the right to refuse to testify on personal grounds by the German Code of Civil Procedure. Thereby (generally) "persons are entitled to refuse to testify…to whom facts are entrusted, by virtue of their office, profession or status, the nature of which mandates their confidentiality, or the confidentiality of which is mandated by law, where their testimony would concern facts to which the confidentiality obligation refers".[97]

2.1.1.7 Costs of Mediation

The costs of a mediation mainly consist of the fees for the mediator. Those "fees are determined by agreement between the parties and the mediator".[98] Normally the fees vary between 100 € and 600 € per hour depending on the subject matter of the dispute, e.g. those fees vary between £80 and £480 per hour (exchange rate from December 2014).[99] It is common practice at the beginning of a mediation that the mediator estimates the final costs which are to be expected.[100]

There can be several situations, similar to the idea of section 654 of the German Civil Code, in which the claim to a mediation fee can be excluded if the mediator acts contrary to the content of the agreement to mediate or the Mediation Act.[101] Moreover, "if the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby."[102] These damages may be demanded from the mediator as well as from the parties when they act contrary to the agreement they settle at the beginning of the mediation about their individual duties.

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[97] German Code of Civil Procedure, Section 383 (1) No. 6.

[98] Bach, Gruber, Volume I, 174.

[99] P. Tochtermann, *Mediation in Germany: The German Mediation Act – Alternative Dispute Resolution at the Crossroads*, in Hopt, Klaus J., and Steffek, Felix (ed.), Mediation, Principles and regulations in comparative perspective, 1st. edition, 521 – 584, (Oxford, 2013), 542.

[100] R. Ponschab and A. Schweizer, *Die Streitzeit ist vorbei, Wie Sie mit Wirtschaftsmediation schnell, effizient und kostengünstig Konflikte lösen,* Ein praxisorientiertes Handbuch, (Paderborn, 2004), 33.

[101] Ahrens, 2466.

[102] German Civil Code, Section 280 (1).

2.1.2 Court-annexed Mediation

Court-annexed mediation means mediation initiated by court procedure but conducted by a person independent of the court.[103] As the German Mediation Act does not distinguish between out-of-court and court-annexed-mediation all previously reported regulations are also valid for court-annexed mediation. But additional regulations, particular to court-annexed mediation, are contained in the German Code of Civil Procedure.

Section 278 (1) of the German Code of Civil Procedure has always forced the court to act "in the interests of arriving at an amicable resolution of the legal dispute or of the individual points at issue" in all circumstances of the proceedings. Thus, in practice some courts have tended to recommend mediation. This possibility is now explicitly manifest in section 278 a (1) of the German Code of Civil Procedure and if the parties agree to participate in mediation, the court shall order the suspension of the litigation.[104]

Furthermore, the statement of claim to initiate a court proceeding shall now contain the "information as to whether, prior to the complaint being brought, attempts were made at mediation…and shall also state whether any reasons exists preventing such proceedings from being pursued."[105] This regulation does not necessarily require mediation, but at least it forces lawyers to inform the parties about the possibility of mediating,[106] thereby helping to promote mediation.

Mediation can even be a condition for a subsequent court proceeding. This mandatory pre-trial mediation is based on section 15 a Introductory Act to the German Civil Code. Therefore state law may provide that some suits (only for a small subset of cases, e.g. in minor cases, small claims or neighbours' disputes) may not be commenced until an attempt for settlement has been made at an approved conciliation office.[107] Such a conciliation office is a public approved institution to solve disputes out of court, preferably in a cooperative manner, which is often done by mediation. In Germany eleven out of sixteen

[103] Gesetzentwurf (Draft), German Mediation Act, 1.

[104] German Code of Civil Procedure, Section 278 a (2).

[105] Ibid., Section 253 (3) No. 1.

[106] Ahrens, 2469.

[107] Introductory Act to the German Code of Civil Procedure, Section 15 a (1).

German states have been or still are requiring some form of such mandatory mediation.[108] The subset of cases for which pre-trial mediation is required varies from state to state and can depend on the value in dispute or on the matter in dispute. In a similar way the requirements about who may serve as a mediator in the pre-trial mediation vary up to allowing only professional jurists to conduct such mediations.[109]

Mediation can also fulfil the requirement of having an attempt to reach an amicable resolution of the dispute before being allowed to initiate a subsequent court proceeding by section 278 (2) German Code of Civil Procedure. By this section before trial, generally the court shall hold a conciliatory hearing for the purpose of encouraging settlement of the dispute. This conciliatory hearing usually is a judicial mediation, which will be examined below in section 2.1.3.

No such hearing is required if the parties have previously attempted to reach a settlement through an extrajudicial conciliation office.[110] Mediators can be authorized by the Land Department of Justice to be such an extrajudicial conciliation office.[111] A mediation settlement of this type is a title of execution, as settlements before a dispute-resolution entity established or recognized by the Land Department of Justice are an enforceable legal document.[112]

There may be financial assistance for the parties from the public purse for the costs of mandatory pre-trial mediation, if a party is in need, if there are no other sources of financial support, and if the party's claims are not frivolous.[113]

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[108] Bach, Gruber, Volume I, 175.

[109] Ibid., 178.

[110] German Code of Civil Procedure, Section 278 (2).

[111] Ibid., Section 794 (1) No. 1.

[112] Ibid.

[113] German Law on Legal Aid, Section 1.

2.1.3 Judicial Mediation

Like the other types of mediation, judicial mediation is an independent procedure which nonetheless takes place during court procedure. Different to court-annexed mediation, the mediator in judicial mediation is a judge. By section 278 (2) of the German Code of Civil Procedure the court usually shall hold a conciliatory hearing before trial. The court may refer the parties of the dispute to a judge correspondingly delegated or requested for the conciliation hearing.[114] This process is "judicial mediation".

Like any mediator, and different to the traditional role of a judge, this judge does not have authority to decide the parties' dispute. Moreover, even if the mediation fails, this judge will not conduct the resultant court proceeding. Thus this judge has been called "court mediator"[115] although he is a regular judge in the meaning of section 16 German Code on Court Constitution. In this role he is selected by the schedule of responsibilities of the court, whereas mediators in the definition of the German Mediation Act shall be chosen by the parties themselves.[116] This conciliation judge is not a mediator in the meaning of the German Mediation Act.[117]

Thus the German Mediation Act now prohibits the use of the original designation "court mediator".[118] Instead the person who guides the parties through this process is called "conciliation judge".

In practice, many courts experimented with hiring a special judge whose only duty was to help litigating parties to reach an agreement.[119] Originally this should be done by pure mediation in a strict sense, but judges did not restrict themselves to pure mediation and also offered their assessment of the case. Now conciliation judges are explicitly allowed to use "all methods of conflict resolution".[120] This means that the conciliation judge may

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[114] German Code of Civil Procedure, Section 278 (5).

[115] German Mediation Act, Section 9 (1).

[116] Ibid., Section 2 (1).

[117] Ahrens, 2469.

[118] German Mediation Act, Section 9 (1).

[119] Bach, Gruber, Volume I, 181 et seq.

[120] German Code of Civil Procedure, Section 278 (5).

freely express his opinion about the case, and he may also indicate how the presiding judge would decide.[121]

The costs of any procedure before the conciliation judge "will be treated as costs of the ensuing litigation".[122] Thus the costs could be paid by financial aid for court costs.

2.1.4 Conclusion on the Domestic Law of Germany

In creating the Mediation Act on 21 July 2012 Germany transposed Directive 2008/52/EC into national law, valid not only for cross-border dispute mediation but also for internal dispute mediation processes. Most of the sections of the Mediation Act transfer the traditional principles of mediation into binding law. Thus, the practice of domestic dispute mediation did not really change, but for the first time mediation is regulated by law in Germany. This development was (indirectly) caused by Directive 2008/52/EC because of the monistic approach Germany chose to implement this Directive.

Some regulations of the Mediation Act, like the requirements for the education of "Certificated Mediators", are still to be fully implemented. Thus it is too early yet to prove if the Mediation Act has reached its goal to promote mediation.

2.2 Scotland

In Scotland, mediation is seen as "a process in which disputing parties seek to build agreement and/or improve understanding with the assistance of a trained mediator acting as an impartial third party. Mediation is voluntary and aims to offer the disputing parties the opportunity to be fully heard, to hear each other's perspectives and to decide how to resolve their dispute themselves."[123]

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[121] Bach, Gruber, Volume I, 182 et seq.

[122] Ibid., 183.

[123] cf. Code of Practice for Mediation in Scotland, Adopted by the Board of the Scottish Mediation Network on 19.11.08 and B. Gill, *Gill Report, Report of the Scottish Civil Courts Review*, Volume1, Chapters 1-9, 2009, 167.

Although mediation has been in use for quite some time,[124] "there is no primary legislative basis regulating…mediation" in the United Kingdom [125] and so the manifestations of mediation vary. In Scotland mediation is not as widely used as in other jurisdictions,[126] especially England and Wales,[127] where the use of mediation attained greater significance in the 1990s[128] because of the high costs of litigation.[129]

However, "there was widespread recognition of the benefits of mediation" in several contexts in Scotland, too.[130] The Gill Report recognized that "mediation may, in some cases, offer advantages over litigation, particularly in cases where it is important to preserve relationships."[131] The court in most cases does not have the power to compel parties to undergo mediation,[132] but sometimes judges may give an order to mediate, for example in small claims[133] or in some higher value commercial actions[134] or in certain family actions.[135]

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[124] J. M. Scherpe and B. Marten, *Mediation in England and Wales: Regulation and Practice*, in Hopt, Klaus J., and Steffek, Felix (ed.), *Mediation, Principles and regulations in comparative perspective*, 1st. edition, 367 – 454, (Oxford, 2013), 367.

[125] Crawford, Carruthers, Volume I, 516.

[126] cf. Rt Hon Lord Gill, *Scottish Civil Courts Review, A Consultation Paper (Gill Review)*, 2007, 49.

[127] cf. Rt Hon Lord Gill, *Report of the Scottish Civil Courts Review (Gill Report),* Volume1, Chapters 1-9, 2009, 169.

[128] Scherpe, Marten, 367.

[129] cf. N. Andrews, *The Modern Civil Process: Judicial and Alternative Forms of Dispute Resolution in England, Veröffentlichungen zum Verfahrensrecht*, Volume 50, (Tübingen, 2008), 5 et seq.

[130] Crawford, Carruthers, Volume I, 519.

[131] Gill Report, 170.

[132] Ibid., 171.

[133] cf. Act of Sederunt (Small Claim Rules) 2002, Rule 9.2 (2) (b).

[134] cf. Court of Session Practice Note 6, 2004 (Commercial Actions), application and interpretation of Chapter 47 of the Rules of the Court of Session, R.C.S. 1994, Rule 11 (1).

[135] cf. Rules of the Court of Session, Chapter 49, Family Actions, Rule 49.23.

2.2.1 Out-of-court Mediation

As mediation in Scotland is principally by will of the parties, disputing parties can mediate in circumstances "where no court proceedings have been commenced between them".[136] This may be described as out-of-court mediation and can help parties to reach agreement, thus "avoiding litigation altogether"[137], or at least reducing the dispute and thereby narrowing litigation.

2.2.1.1 Mediator

Accreditation of mediators is not mandatory in Scotland and "there is no single universal…scheme…which regulates the selection and appointment of mediators", so "any individual may act as a mediator without the need for accreditation,…formal qualifications, (or) training".[138]

Mediation in Scotland is a "self-regulating sector"[139], where mediation organizations (mainly the Law Society of Scotland and the Scottish Mediation Network) set out standards and accreditation schemes.

The Law Society of Scotland[140] operates two recognized mediation schemes: Commercial Law Mediation and Family Law Mediation.[141] To be accredited as a Family or Commercial Mediator of the Law Society of Scotland one "should be able to demonstrate suitable training and have relevant experience".[142] That means that applicants "must produce a report about their mediation skills from the mediation trainer who observed them in role-plays as a mediator during a foundation mediation training course lasting more than thirty

[136] Crawford, Carruthers, Volume I, 528.

[137] Ibid.

[138] Ibid., 530.

[139] Ibid.

[140] Available at http://www.lawscot.org.uk, site visited on 10 February 2014.

[141] cf. http://www.lawscot.org.uk/members/membership-and-registrar/accredited-specialists/mediation, site visited on 10 February 2014.

[142] cf. Guidance Notes for Application to be Accredited or Re-accredited as a Family or Commercial Mediator of the Law Society of Scotland, October 2011, No. 2.

hours".[143] Furthermore, among other factors, references will be considered, e.g. if the applicant was author "of books, articles, website and in-house materials"[144] or other relevant matters.

To be registered as a mediator, the Scottish Mediation Network[145] requires mediation training including not less than forty hours of tuition and role-play, sufficient experience and continuing practice development, adherence to an appropriate code of conduct, appropriate insurance and several further administrative requirements.[146] "The mediation training should include training in principles and practice of mediation, stages in the mediation process, ethics and values of mediation, the legal context of disputes, communication skills useful in mediation, negotiation skills and their application, the effects of conflict and ways of managing it, and diversity" training.[147]

The Code of Practice for Mediation in Scotland of the Scottish Mediation Network forces a mediator to be "impartial and independent. If mediators become aware of any reason which may diminish their impartiality or independence, they shall disclose this to the parties at the earliest opportunity and withdraw from the mediation unless the parties do not wish them to do so". Furthermore, "a mediator shall disclose all actual and potential conflicts of interest reasonably known to the mediator whether before or during a mediation and shall withdraw from the mediation unless the parties do not wish him/her to do so." "A mediator must not accept from or exchange any gift or favour with any party in any mediation. A mediator must use judgment that reflects the high ethical standards which mediation requires".[148]

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[143] Guidance Notes for Application to be Accredited or Re-accredited as a Family or Commercial Mediator of the Law Society of Scotland, October 2011, No. 2.

[144] Ibid., No. 3 d.

[145] Available at http://www.scottishmediation.org.uk, site visited on 12 February 2014.

[146] cf. Practice Standards for mediators of the Scottish Mediation Network, 25.05.11, 1.1.1. et seq.

[147] Ibid.

[148] cf. Code of Practice for Mediation in Scotland, Adopted by the Board of the Scottish Mediation Network on 19.11.08.

2.2.1.2 Mediation Procedure

In Scotland, before a mediation takes place, there can be an agreement to go to mediation, which means that, either voluntarily or by court direction (see below under 2.2.2) the parties agree to undergo mediation.[149]

Mediation procedure in Scotland is regulated by "party autonomy and natural justice"[150], which means that often at the beginning of mediation a written agreement to mediate "will detail the mediation venue and the general basis of the mediation procedure including the role to be played by the mediator during the mediation process".[151]

The Scottish Mediation Network defines mediation as "a process"[152], but it does not regulate the course of the proceeding. This definition just includes the principle of voluntariness as being important for mediation. The Code of Practice for Mediation of the Scottish Mediation Network also requires confidentiality, as it "is important to encourage all participants to speak truthfully and candidly, and to enable a full exploration of issues in dispute. Unless compelled by law, or with the consent of all the parties, a mediator shall not disclose any of the information given during the mediation process."[153] Furthermore, in accordance with this Code of Practice, "in mediation people should always be treated with respect and without discrimination".

2.2.1.3 Legal outcomes and aspects of Mediation

Successful mediation ends with an agreed solution, the negotiated mediation settlement, which will be "the outcome most desired by all sides".[154]. There are no requirements as to form or content, but it is common practice to have a written settlement signed by all the

[149] cf. E. B. Crawford and J. M. Carruthers, *United Kingdom*, in: C. Esplugues (ed.), Civil and commercial Mediation in Europe, Cross-Border Mediation, Volume II, (Cambridge, 2014), 466.

[150] Crawford, Carruthers, Volume I, 531.

[151] Ibid., 531 et seq.

[152] cf. Code of Practice for Mediation in Scotland, Adopted by the Board of the Scottish Mediation Network on 19.11.08 and B. Gill, *Gill Report*, 167.

[153] Code of Practice of the Scottish Mediation Network.

[154] Gill Report, 169.

parties. This settlement constitutes a contract between the parties and as such is legally enforceable by contract law, but usually "parties will readily perform such obligations as they have voluntarily undertaken" in the agreement.[155] However, in Scotland, there may be the possibility to register the mediation settlement for preservation and possibly execution in the Books of Council and Session of Scotland, formally The Register of Deeds and Probative Writs, which makes the settlement "an authentic instrument in the sense that an extract of the document can then be issued and relied on as a basis for diligence without further recourse to a court".[156] This is possible for any deed, notwithstanding that it was not created in Scotland.[157]

Another way to make a mediation agreement enforceable would be to undergo mediation at first until a solution is found and then change the process into arbitration and settle the agreement in form of tribunal's award, which makes the agreement "final and binding"[158] so a court may give, "on an application by any party, order that a tribunal's award may be enforced".[159] Although arbitration in Scotland is a very different process to mediation, arbitration may follow mediation.

2.2.1.4 Costs of Mediation

In the agreement to mediate the parties fix all relevant circumstances of the mediation, including fees and expenses.[160] Normally fees are payable by parties on an equal basis, but this is largely left to the disputing parties and free to be negotiated. The cost of mediation varies depending on the matter in dispute and the value of the claim. In practice, lower value claims will cost less to mediate and increase on a sliding scale with the value of the

[155] Crawford, Carruthers, Volume I, 532.

[156] Ibid.

[157] cf. Court of Session Rules (Scotland), Chapter 062, Part II, Registration and Enforcement under the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933, Rule 62.4 et seq.

[158] Arbitration (Scotland) Act 2010, Enforcing and challenging arbitral awards etc., Section 11 (1).

[159] Ibid., Section 12 (1).

[160] Crawford, Carruthers, Volume I, 529 et seq.

claim varying from £50 per hour, per party up to over £95 per hour and per party, e.g. those fees vary between £100 and £200 per hour altogether.[161]

2.2.2 Court-annexed Mediation

Court-annexed mediation means any mediation that is concerned with the same matter as a court proceeding. In such cases, although mediation in Scotland can help to avoid litigation, the parties are free to resort to litigation when mediation has failed,[162] so litigation may follow mediation. Mediation can also be initiated by litigation, because the judge in some cases may or even must invite parties to consider using mediation even where litigation already has been commenced.[163]

In certain types of small claims, for example, the judge is obliged to "seek to negotiate and secure settlement of the claim between the parties."[164] In higher value commercial actions the commercial judge may make such orders too, as "before a commercial action is commenced it is important that, safe in exceptional cases, the matters in dispute should have been discussed and focused in pre-litigation communications between the prospective parties` legal advisers."[165] In general, "actions should not be raised using the commercial procedure, until the nature and extent of the dispute between the parties has been the subject of careful discussion between the parties and/or their representatives and the action can be said to be truly necessary."[166] In the sheriff court in commercial disputes at the case management conference, the sheriff may make "any order which the sheriff thinks will result in the speedy resolution of the action (including the use of alternative dispute resolution), or requiring the attendance of parties in person at any subsequent hearing."[167] Likewise in several family actions, "the court may, at any stage of the action where it

[161] cf. The average costs of the Scottish Mediation Network, available under http://www.scottishmediation.org.uk/about/what-is-mediation, site visited on 12 February 2014.

[162] Crawford, Carruthers, Volume I, 532.

[163] Ibid., 533.

[164] cf. Act of Sederunt (Small Claim Rules) 2002, Rule 9.2 (2) (b).

[165] cf. Court of Session Practice Note 6, 2004 (Commercial Actions), Rule 11 (1).

[166] Ibid., Rule 11 (3).

[167] cf. Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No.1956 (S.223), Rule 40.12. (3) (m).

considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organization."[168]

While mediation is attempted, "judicial proceedings may be temporarily suspended at the request of the parties"[169] and where a resolution is reached in court-annexed mediation, the settlement will be binding and enforceable "according to the rules of diligence of the forum".[170]

In view of confidentiality, mediators in Scotland regularly bind themselves by a Code of Practice for Mediation which requires confidentiality[171] and parties regularly bind themselves by confidentiality clauses included in the mediation agreement, but (except in family mediations)[172] confidentiality of mediation is "not currently guaranteed by any legislation".[173]

Similarly to out-of-court mediation, the cost of court-annexed mediation can be up to over £95 per hour and per party,[174] as in Scotland mediation fees normally are payable by parties on an equal basis.[175] In contrast, in England and Wales, courts have the power of encouraging the use of alternative dispute resolution methods, including mediation, even by making different orders about costs, as courts enjoy a wide discretion.[176] Such regulations, where the conduct of parties in relation to mediation may be relevant in the award of costs, are not planned to become a feature of litigation in Scotland.[177]

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[168] cf. Rules of the Court of Session, Chapter 49, Family Actions, rule 49.23.

[169] cf. Crawford and Carruthers, *United Kingdom I*, 533, referring to: Arbitration (Scotland) Act 2010, Suspension of legal proceedings, Section 10 (1).

[170] Crawford, Carruthers, Volume I, 535.

[171] Code of Practice of the Scottish Mediation Network.

[172] cf. Civil Evidence (Family Mediation) (Scotland) Act 1995, Chapter 6.

[173] cf. S. Tuddenham, *The Role of Mediation in Scottish Civil Law: Proposals*, (Edinburgh 2011), No. 5c.

[174] cf. The average costs of the Scottish Mediation Network, available under http://www.scottishmediation.org.uk/about/what-is-mediation, site visited on 12 February 2014.

[175] Crawford, Carruthers, Volume I, 537.

[176] Scherpe, Marten, 386 et seq.

[177] Gill Report, Chapter 7, para 35.

To promote mediation, in certain court-annexed schemes the services of the mediators have been provided free of charge.[178] Furthermore, the parties can apply to the Scottish Legal Aid Board to provide funding for the cost of mediation.[179]

2.2.3 Judicial Mediation

In Scotland there is a special kind of mediation available in certain types of cases which is called "judicial mediation". This type of mediation arises in the context of Employment Tribunals and is seen as "very effective in many cases".[180]

"Employment tribunals determine disputes between employers and employees over employment rights".[181] Usually, the process at an Employment Tribunal is a formal one, including a hearing with legal arguments and ending with a decision being made, similar to what happens in a court.[182]

However, some of those cases are suitable for mediation and the Vice-President of Employment Tribunals (Scotland) decides which cases will be put forward for judicial mediation.[183] This offers an alternative way to resolve the dispute which does not involve going through the normal tribunal hearing process, but entails a special kind of mediation instead.[184]

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[178] cf. Margaret Ross and Douglas Bain, Report on Evaluation of In Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts, Scottish Government, Social Research, Edinburgh 2010, 1.19.

[179] cf. Information for "Legal Aid for Mediation" of the Scottish Mediation Network, available under http://www.scottishmediation.org.uk/wp-content/uploads/2012/02/Legal-Aid-Information.pdf, site visited on 12 February 2014.

[180] cf. The Law Society of Scotland, "Resolving Workplace Disputes: Consultation BIS", April 2011, available at "http://www.lawscot.org.uk/media/278231/microsoft%20word%20-%20resolving_workplace_disputes_lss_response.pdf.", site visited on 10 February 2014, No. 2.

[181] cf. Employment Tribunal Guidance (Scotland) of the Ministry of Justice, available at http://www.justice.gov.uk/tribunals/employment, site visited on 27 February 2014.

[182] Ibid.

[183] cf. Information to Judicial Mediation of the Ministry of Justice, Employment Tribunals (Scotland), available at "https://www.justice.gov.uk/downloads/tribunals/employment/judicial-mediation/JudicialMediationScotland.pdf.", site visited on 27 February 2014, 2.

[184] Ibid., 1.

In Scotland, the judicial mediator is an Employment Judge who has been trained as a mediator and who will be appointed by the Vice President to deal with the case.[185] This is the main difference to out-of-court or court-annexed mediations, which are regulated by party autonomy, which means that usually the agreement to mediate determines the mediator and his or her role to be played during the mediation process.[186]

Nevertheless, the principles of judicial mediation do not differ from any other type of mediation as judicial mediation is voluntary[187], confidential[188] and the mediator does not take sides or make judgments, which means that this mediator will neither offer legal advice to parties nor express a view on the prospects of success of parties if the case should be judicially determined.[189]

The case will be judicially determined if the judicial mediation is not successful and no agreement can be reached. The mediation will not delay the case being listed in the normal way for its full Employment Tribunal Hearing, nor will it delay the date which will be fixed for that Hearing.[190] Importantly, no information out of the judicial mediation may be used in any subsequent hearing and the Judicial Mediator will have no further involvement with the case.[191]

More usually judicial mediation tends to conclude in a much shorter time period than tribunal litigation and judicial mediation thereby is extremely cost effective.[192] When mediation is successful and the parties reach an agreement in the judicial mediation they will be able to finalize the process by means of a compromise agreement.[193]

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[185] Information to Judicial Mediation of the Ministry of Justice, Employment Tribunals (Scotland), 2.

[186] Crawford, Carruthers, Volume I, 531 et seq.

[187] cf. Information to Judicial Mediation of the Ministry of Justice, Employment Tribunals, (Scotland), 1.

[188] Ibid., 3.

[189] Ibid., 1.

[190] Ibid., 2.

[191] Ibid., 3.

[192] The Law Society of Scotland, „Resolving Workplace Disputes: Consultation BIS“, No. 3.

[193] cf. Information to Judicial Mediation of the Ministry of Justice, Employment Tribunals, (Scotland), 3.

2.2.4 Conclusion on the Domestic Law of Scotland

Domestic mediation in Scotland is (nearly almost) regulated by mediation organizations and by party autonomy. This did not change with the implementation of Directive 2008/52/EC, as Scotland chose the dualistic approach, i.e. implemented the Directive only in regard to cross-border disputes. Neither the practice, nor the legal landscape of domestic dispute mediation in Scotland was changed by Directive 2008/52/EC. Thus, the Directive had no impact on domestic dispute mediation in Scotland.

Mediation in Scotland brings the advantages of autonomy, speed and cost reduction to the parties and relieves the judicial system of financial and operational burden. Those benefits of mediation are increasingly recognized and so it can be expected that the use of mediation in Scotland will increase.

2.3 Switzerland

In Switzerland there is a long tradition of alternative dispute resolution, nowadays mainly consisting of two main forms, arbitration and mediation,[194] which have to be distinguished.

Although arbitration is a voluntary conflict solution independent from court,[195] there are similarities to court proceedings such as the taking of evidence or even assistance of the official authorities and participation of the ordinary court.[196] In contrast to mediation, the arbitration tribunal has decision-making-power and the result of such arbitration will be a judgment.[197]

Mediation is the newer special form of alternative dispute resolution in Switzerland as it came in use only in the late 1980s.[198] The main contrast to arbitration is that there will be

[194] Botschaft zur Schweizerischen Zivilprozessordnung (ZPO), Message on the Swiss CCP, 28.6.2006, 7243.

[195] Ibid., 7392.

[196] Swiss Code on Civil Procedure, Art. 375.

[197] Ibid., Art. 381.

[198] C. Kumpan, and C. Bauer-Bulst, *Mediation in Switzerland: A New Approach in a Conciliation-oriented Tradition*, in: Hopt, Klaus J., and Steffek, Felix (ed.), Mediation, Principles and regulations in comparative perspective, 1st. edition, 1201 – 1244, (Oxford, 2013), 1202 et seq.

no binding judgment as a result of mediation and a mediator does not have any decision making power in Switzerland.[199] Formerly, the use of mediation especially in relation to court proceedings, or in relation to the work of lawyers in general, was very rare.[200] Recently a new (the first) Swiss Federal Code on Civil Procedure came into in force. A central goal of this Code on Civil Procedure is to avoid court proceedings by resolving conflicts by means of a voluntary solution,[201] so it is no surprise that this Swiss Federal Code on Civil Procedure includes regulations about mediation. Now mediation is a main possibility in Switzerland to resolve a dispute instead of filing a lawsuit.[202] Mediation in Switzerland can be[203] or can become[204] related to a court proceeding about the same subject matter. These types of mediation can be seen as court-annexed mediation.[205]

However, traditionally mediation in Switzerland was seen as an out-of-court procedure.[206]

2.3.1 Out-of-court Mediation

Before the first Swiss Federal Code on Civil Procedure came into in force, the Swiss Federal Council described mediation as a structured out-of-court procedure in which a neutral and independent third person without any decision-making power helps the parties to resolve a dispute.[207] Those attributes of mediation are omnipresent in Switzerland, so they have not been transferred into the Swiss Code on Civil Procedure itself and this law "does not contain any definition of the term mediation".[208] Generally, the Swiss Federal

[199] Message on the Swiss CCP, 7335.

[200] J. T. Peter, *Gerichtsnahe Mediation, Kommentar zur Mediation in der ZPO*, (Bern, 2011), VII.

[201] Ibid., 11.

[202] Kumpan, Bauer-Bulst, 1222.

[203] Swiss Code on Civil Procedure, Art. 214.

[204] Ibid., Art. 213.

[205] Peter, IX.

[206] Message on the Swiss CCP, 7335.

[207] Ibid., 7335.

[208] Kumpan, Bauer-Bulst, 1204.

Council saw no need to regulate out-of-court mediation within the Swiss Code on Civil Procedure, but the Council recommends the regulations of the Swiss mediation organizations instead, although those regulations are not mandatory by law.[209] Those organizations set out rules for the practice of out-of-court mediation in Switzerland and compliance therewith is a necessary prerequisite of accreditation by, and/or membership of, the relevant mediation organisation.

2.3.1.1 Mediator

There is no legal definition of "mediator" in Swiss law, and no accreditation is mandatory by law.[210] This means, that, in principle, anyone may act as a mediator without the need for accreditation, qualifications or training.

However, the main mediation organizations in Switzerland (mainly Swiss Bar Association, Swiss Association for Mediation, Swiss Chamber for Commercial Mediation) set out standards regulating accreditation in practice.[211]

2.3.1.2 Training of the Mediator

The accreditation of the Swiss Chamber for Commercial Mediation requires a basic education in economics or administration, followed by five years of professional experience, or three years of professional experience after a university degree.[212] Furthermore, at least 120 hours of education especially in mediation[213] or being trainer for

[209] Message on the Swiss CCP, 7335 et seq.

[210] Ibid., 7335.

[211] Ibid., 7335.

[212] Regulations for Accreditation of the Swiss Chamber for Commercial Mediation, 1.10.2007, Section 3.a.

[213] Ibid., Section 3.b.

commercial mediation [214] are prerequisites. Therefore the Swiss Chamber for Commercial Mediation offers accredited education and training.[215]

The Swiss Association for Mediation requires at least 200 hours of training, being educated in communication and cooperative conflict-management and having adequate theoretical and practical experiences to be accredited.[216]

For accreditation by the Swiss Bar Association, one must have a basic education as mediator to the extent of at least 120 hours[217] and an additional education especially at an institution of the Swiss Bar Association.[218]

The several forms of education mentioned above are "mainly offered by universities, professional schools and mediation associations" themselves.[219]

2.3.1.3 Certified Mediator

Switzerland does not have a uniform title "Certified Mediator", but several titles that certify a mediator, like the title "Mediator SCCM" [220] of the Swiss Chamber for Commercial Mediation, the title "Mediator SDM-FSM"[221] of the Swiss Association for Mediation and the title "Mediator SAV" [222] of the Swiss Bar Association.

These titles do not have any legal consequence per se. Such certified mediators do not have any more legal powers than any mediator who is not certified, but in Switzerland in practice there are no mediators acting without certification, because parties typically

[214] Regulations for Accreditation of the Swiss Chamber for Commercial Mediation, Section 3.c.

[215] Statutes of the Swiss Chamber for Commercial Mediation, 6.4.2011, Section 10.5.

[216] Regulations of Acceptation of the Swiss Association for Mediation, 25.1.2011, Section 2.

[217] Reglement Mediator SAV, 1.7.2007, Section 3.2.

[218] Ibid., Section 4.

[219] Kumpan, Bauer-Bulst, 1231.

[220] Statutes of the Swiss Chamber for Commercial Mediation, 6.4.2011, Section 10.5.

[221] Regulations of Acceptation of the Swiss Association for Mediation, 25.1.2011, Section 2.

[222] Reglement Mediator SAV, 1.7.2007.

require such certification and qualification. Even the lawmakers imply the expectation of certification.[223] Thus, in practice the certifications of the various mediation organizations take care of an adequate and comparable education of mediators in Switzerland.

2.3.1.4 Person of Mediator

Although there is no legal definition of "mediator" in Switzerland,[224] the Swiss Federal Council reflected the attributes of a mediator in the definition of mediation as a procedure in which a neutral and independent third person, without any decision-making power, helps parties resolving a dispute.[225]

Thus neutrality, independence and the lack of decision-making power characterize a mediator. Those principles are common in any definition of a mediator in Switzerland. For example, the Swiss Chamber for Commercial Mediation forces a mediator to be independent, impartial and neutral.[226] Independence by definition of the Code of Behaviour for Mediators of the Swiss Chamber for Commercial Mediation means that the mediator is not involved in the dispute in any way or has any close relation to any of the parties. Being impartial requires that no party may receive preferential treatment. Neutrality means that the mediator is not allowed to decide the dispute, or even prefer one solution, without all parties consenting.[227]

[223] Peter, 16.

[224] Message on the Swiss CCP, 7335.

[225] Ibid., 7335.

[226] Code of behaviour for mediators of the Swiss Chamber for Commercial Mediation, 13.10.2007, Section I.2.

[227] Ibid., Section II.7.

2.3.1.5 Mediation Procedure

There is no binding procedure or binding content of mediation by any Swiss law, whether by Swiss Federal law nor by Canton law.[228]

Before mediation starts, there can be an agreement to go to mediation by which parties oblige themselves to undergo mediation. In Switzerland this is often done by a mediation clause and there are suggestions given by the main Swiss mediation organizations for the contents of such a mediation clause for contracts or when the parties are already involved in a dispute. Those mediation clauses determine, for example, which kind of dispute shall be submitted to mediation, where the seat of the mediation shall be and in which language the proceedings shall be conducted.[229]

Usually mediation starts with an agreement to mediate. The parties and the mediator agree about the concrete procedure and content of each mediation at the beginning of a mediation.[230] Therefore, the mediator has to inform the parties, for example, about their role, their duties of confidentiality and about the structure of mediation.[231]

Most mediation organizations have created model or proforma agreements or at least lists of content for such an agreement. The subject of the mediation, the duties of the mediator and the expected costs are regular parts of agreements to mediate.[232]

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[228] Kumpan, Bauer-Bulst, 1225.

[229] cf. Mediation Clauses of the Swiss Chambers' Arbitration Institution, available at https://www.swissarbitration.org/sm/en/clauses.php, site visited on 4 March 2014.

[230] Code of behaviour for mediators of the Swiss Chamber for Commercial Mediation, 13.10.2007, Section I.2.

[231] Guidelines on mediation of the Swiss Bar Association, 25.1.2005, Section 5.1.

[232] Ibid., Section 8.

2.3.1.6 Legal outcomes and aspects of Mediation

A successful mediation usually ends with a settlement of the mediation.[233] This settlement can be written down,[234] but as with any private agreement between the parties, it "is not submitted to any rules on form".[235] By the rules of Swiss Obligation Law[236] such (simple) mediation settlements are not enforceable per se, but a court judgment based on such a mediation settlement would be enforceable. There are further possibilities for execution of this settlement. As those possibilities belong to the court they will be examined below under 2.3.2.5.

The issue of suspension of the Statute of Limitations by out-of-court mediation is not regulated in the Swiss Code on Civil Procedure as long as there is no connection to a court procedure. If parties want to make sure that they avoid statutory limitation periods, they need to commence a court proceeding additional to mediation[237] otherwise they might lose their right to pursue their claim. Court proceedings remain suspended until the end of the mediation.[238]

Confidentiality of mediation is safeguarded by Article 216 of the Swiss Code on Civil Procedure in the way that mediation proceedings are "confidential and kept separate from the court".[239] Therefore, it is prohibited to use the statements of the parties in subsequent court proceedings.[240] Article 216 of the Swiss Code on Civil Procedure is embedded into articles regulating court-annexed mediation, so it certainly (at least) regulates court-annexed mediation, but shall also be valid for out-of-court mediation, because the sense of this regulation is to safeguard confidentiality of any type of mediation.[241] The Swiss

[233] Peter, 17.

[234] Guidelines on mediation of the Swiss Bar Association, 25.1.2005, Section 9.

[235] Kumpan, Bauer-Bulst, 1217.

[236] Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Swiss Federal Code of Obligations).

[237] Kumpan, Bauer-Bulst, 1209.

[238] Swiss Code on Civil Procedure, Art. 214 (3).

[239] Ibid., Art. 216 (1).

[240] Ibid., Art. 216 (2).

[241] Kumpan, Bauer-Bulst, 1222.

Federal Council, while creating the Swiss Code on Civil Procedure, set the maxim "conciliation before trial" (especially conciliation forms independent from court) and safeguarding confidentiality of any type of mediation is essential to achieve this maxim.[242]

Similarly, by article 166 of the Swiss Code on Civil Procedure, a mediator (of any type of mediation) may refuse to cooperate when asked to testify on facts that have come to his or her attention in the course of his or her activities.[243]

Thus, confidentiality is safeguarded in any and all forms of mediation as regards the mediator as well as the parties,[244] to enable openness in any mediation without fearing that the content of the mediation will be held against anyone in subsequent proceedings.[245]

2.3.1.7 Costs of Mediation

As in other countries, the costs of mediation in Switzerland mainly consist of the fees for the mediator. Usually those fees are determined by agreement between the parties and the mediator at the beginning of the mediation.[246] Regularly, those fees vary between 100 CHF and 250 CHF per hour, i.e. those fees vary between £65 and £160 per hour (exchange rate from December 2014).[247] If a mediator or a party acts contrary to the mediation agreement, damages may be demanded from him or her by Swiss Obligation Law.[248]

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[242] Message on the Swiss CCP, 7328.

[243] Swiss Code on Civil Procedure, Art. 166 (1) d.

[244] Kumpan, Bauer-Bulst, 1222.

[245] Peter, 5.

[246] Guidelines on mediation of the Swiss Bar Association, 25.1.2005, Section 7.1.

[247] Kumpan, Bauer-Bulst, 1237.

[248] Swiss Federal Code of Obligations, Art. 97 et seq.

2.3.2 Court-annexed Mediation

The new Swiss Federal Code on Civil Procedure provides a connection between mediation and court proceedings. Such mediation can be seen as court-annexed mediation,[249] although it still remains a procedure taking place out of and independent from court. The Swiss Code on Civil Procedure knows two types of court-annexed mediation, mediation before[250] and mediation during court proceedings.[251] Mediations before a court proceeding are unsuccessful mediations which are followed by a court proceeding to judge the same subject matter. Mediation during court proceedings are mediations initiated by the judge[252] or the parties[253] during an ongoing court proceeding about the same subject matter.

In addition to the general regulations examined above, there are some further regulations especially for court-annexed mediation in articles 213-218 of the Swiss Code on Civil Procedure. These articles regulate the coordination of mediation and court proceedings.[254]

Court proceedings shall be avoided by resolving conflicts by means of a voluntary solution.[255] Therefore the Code on Civil Procedure claims that in general there shall be an attempt at conciliation before any court proceeding.[256] This conciliation usually means arbitration, but “upon the wish of all parties it will be replaced by mediation”.[257]

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[249] Peter, IX.

[250] Swiss Code on Civil Procedure, Art. 213.

[251] Ibid., Art. 214.

[252] Swiss Code on Civil Procedure, Art. 214 (1).

[253] Ibid., Art. 214 (2).

[254] Message on the Swiss CCP, 7335.

[255] Peter, 11.

[256] Swiss Code on Civil Procedure, Art. 197.

[257] Ibid., Art. 213 (1).

2.3.2.1 Mediator

The Swiss Code on Civil Procedure gives no legal definition of who can be "mediator" in such a court-annexed mediation. The Swiss Federal Council mentioned explicitly that "any independent person of trust" can be considered as mediator.[258] In principle (with regard to the Federal level) the parties "can choose any person".[259]

2.3.2.2 Training of the Mediator

In Switzerland the Cantons have the competence for the organization of the courts and some Cantons have established their own requirements about the qualifications of a mediator.[260] For example, the Canton of Vaud requires an education in the field of mediation and at least five months of practical experience,[261] whereas in the Canton of Geneva mediators need permission from the governing council after proof of an adequate education.[262] The Canton of Fribourg has also adopted several rules for the admission of mediators in connection with a court proceeding.[263]

In summary, the requirements about the training of a mediator in connection with a court proceeding may depend on the Canton where the court proceeding takes place. Normally this is the place of residence of the defender.[264]

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[258] Message on the Swiss CCP, 7336.

[259] Kumpan, Bauer-Bulst, 1224.

[260] Peter, 16.

[261] Art. 40 II of the Code de droit privé judiciaire vaudois, 1.1.2013.

[262] Art. 66 Loi sur l'organisation judiciaire (*LOJ*), 1.1.2011.

[263] Kumpan, Bauer-Bulst, 1233.

[264] Swiss Code on Civil Procedure, Art. 10.

2.3.2.3 Person of Mediator

Similar to the definition of a mediator of the Swiss Federal Council as a neutral and independent third person without any decision-making power,[265] there are also definitions in the law of some Cantons stipulating the need for neutrality and independence.[266]

Some Cantons stipulate further conditions about the person of a mediator. For example, in the Canton of Geneva a mediator has to be at least 30 years of age, and must not have been convicted of a crime against reputation or honour.[267] In the Canton of Vaud mediators need to be named in a list of the tribunal which approves that they fulfil certain personal requirements.[268] Similar regulations exist in the law of other Cantons as well.[269]

One precise rule regulating a special issue of neutrality is in the Swiss Code on Civil Procedure itself. Thus, a mediator may not act as judge in the same case i.e. subsequent litigation between the same parties, and concerning the same subject matter, in the event that the mediation fails.[270]

2.3.2.4 Mediation Procedure

Articles 213-218 of the Swiss Code on Civil Procedure regulate coordination of mediation with court procedures.[271] They do not regulate the procedures of mediation itself.[272] On the contrary, the parties alone are responsible for organizing and conducting the mediation.[273]

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[265] Message on the Swiss CCP, 7335.

[266] Peter, 15.

[267] Loi sur l'organisation judiciaire, Art. 67.

[268] Code de droit privé judiciaire vaudois, Art. 40 I.

[269] Kumpan, Bauer-Bulst, 1233.

[270] Swiss Code on Civil Procedure, Art. 47 (1) b.

[271] Message on the Swiss CCP, 7335.

[272] Peter, 12.

[273] Swiss Code on Civil Procedure, Art. 215.

Like in any mediation, in court-annexed mediations the parties and the mediator agree about the concrete procedure[274] to keep mediation as a flexible instrument depending on the matter of subject.

2.3.2.5 Legal outcomes of Mediation

Mediation before court proceedings is often done to fulfil the requirement of having an attempt at conciliation to avoid litigation.[275] Parties therefore often prefer mediation to arbitration,[276] because the relationship of parties and mediator is horizontal,[277] which means that the mediator has no decision making power and no party has to accept any unwanted result, whereas the result of arbitration can be an unwanted binding judgment.[278]

The case becomes pending when an application for this (pre-trial) mediation is filed,[279] which suspends the statute of limitations. If such mediation is unsuccessful, the parties may commence legal action.[280]

Mediation during court proceedings can be recommended by the court at any time[281] or the parties may at any time make a joint request for mediation.[282] The consequence of this is that court proceedings remain suspended until the request is withdrawn by one of the parties, or until the court is notified of the end of the mediation.[283] This encourages the

[274] Code of behaviour for mediators of the Swiss Chamber for Commercial Mediation, 13.10.2007, Section I.2.

[275] Swiss Code on Civil Procedure, Art. 197.

[276] Ibid., Art. 213 (1).

[277] Message on the Swiss CCP, 7335.

[278] Ibid., 7332.

[279] Swiss Code on Civil Procedure, Art. 62 (1) and Art. 213.

[280] Ibid., Art. 213 (3).

[281] Ibid., Art. 214 (1).

[282] Ibid., Art. 214 (2).

[283] Ibid., Art. 214 (3).

parties to solve their dispute on a voluntary basis without the risk of aggravating their situation.

A successful court-annexed mediation usually ends with a settlement. What makes the settlement of court-annexed mediation special is the possibility to jointly request that this settlement be approved. An approved agreement has the same effect as a legally binding decision.[284]

2.3.2.6 Costs of Mediation

According to the Swiss Code on Civil Procedure, in general, the parties shall bear the costs of mediation.[285] "This disadvantages mediation"[286] in relation to traditional proceedings where there might be financial aid for fees. Perhaps this explains why the Federal Law allowed Cantonal Law to provide for further exemptions from costs.[287]

Some Cantons have adopted such rules on the costs of mediation. The Canton of Jura, for example, usually pays the fees for court-annexed mediations.[288] In the Canton of Lucerne some kinds of court-annexed mediations might be funded by individual decision of the president of the concerned department of the court.[289] The Canton of Fribourg fixes the mediation fees by regulation[290] and gives financial aid under several conditions.[291] So far the Cantons of Aargau, Appenzell-Outer Rhodes, Basel-City, Grisons and Zurich have adopted similar rules on the costs of mediation as well.[292] The concrete rules depend on the

[284] Swiss Code on Civil Procedure, Art. 217.

[285] Ibid., Art. 218 (1).

[286] Kumpan, Bauer-Bulst, 1213.

[287] Swiss Code on Civil Procedure, Art. 218 (3).

[288] Art. 11 I Loi d'introduction du Code de procédure civile suisse (LiCPC), 16.6.2012.

[289] § 36 II f Gesetz über die Organisation der Gerichte und Behörden in Zivil-, Straf- und verwaltungsgerichtlichen Verfahren (Justizgesetz, JusG), 10.5.2010.

[290] Art. 127 III Loi sur la justice (LJ), 31.05.2010.

[291] Ibid., Art. 127 (1).

[292] Kumpan, Bauer-Bulst, 1215.

Canton where the annexed court proceeding takes place and this is determined by the Code on Civil Procedure. As mentioned, normally this is the place of residence of the defender.[293]

2.3.3 Mediation-Arbitration

There are similar characteristics between the two main present manifestations of alternative dispute resolution in Switzerland,[294] arbitration and mediation, such as being voluntary conflict solutions independent from court where the arbitrators or mediators usually are chosen by the parties. Nevertheless, the two proceedings have to be strictly distinguished. Mediation can be distinguished from arbitration[295] mainly by the power of the arbitrator in comparison to the power of a mediator. An arbitrator, for example, has the power to take evidence,[296] whereas in mediation only the parties are responsible for conducting the mediation.[297] Furthermore, the main difference is that an arbitrator has decision-making-power and can pass a judgment,[298] whereas it is a common characteristic in any definition of a mediator in Switzerland that a mediator has no decision-making power.

In any event, besides these strict differences between arbitration and mediation, there is one proceeding in Switzerland where arbitration and mediation align, namely, the "Med-Arb" Proceeding:[299]

The term "Med-Arb" consists of "Med" for mediation and "Arb" for arbitration and expresses a combination of those processes. Arbitration as well as mediation should enable a cooperative resolution of a dispute separate from the court proceeding and thereby avoid

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[293] Swiss Code on Civil Procedure, Art. 10.

[294] Kumpan, Bauer-Bulst, 1206.

[295] Message on the Swiss CCP, 7335.

[296] Swiss Code on Civil Procedure, Art. 203 (2).

[297] Ibid., Art. 215.

[298] Ibid., Art. 381.

[299] Peter, 24.

litigation. A combination of those processes might be a further possibility to achieve the general aim of “conciliation before trial”.

The “Med-Arb” Proceeding means that first a mediation takes place. Preferably this mediation ends the whole conflict. Thus it remains a usual mediation.

However, even in a (mostly) successful mediation some topics may remain unresolved. In this case the mediator (and the parties) will terminate the mediation with the realized results, and the role of a mediator without decision-making powers will change into the role of an arbitrator with decision-making powers to decide (only) the remaining unresolved topics.

In the “Med-Arb” Proceeding the same mediator conducts the (following) arbitration. One advantage is not to waste any time between both proceedings. The other advantage is that the arbitrator already knows about the subject matter of the substantive dispute.

This proceeding seems a little strange in view of neutrality of a mediator. A mediator shall not be judge in the same subject matter[300] to enable the parties to act openly in a mediation, but it seems to be wished that a mediator shall be arbitrator in the same subject matter,[301] although an arbitrator has the power to take evidence[302] and pass a judgment[303] as well. However, the main difference of such an arbitrator to a judge is that the parties are free to choose the arbitrator.[304]

By way of a “Med-Arb”-Proceeding the settlement can be recorded in the form of an award. That makes the settlement enforceable even if the proceeding remains a usual mediation.[305]

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[300] Swiss Code on Civil Procedure, Art. 47 (1) b.

[301] Peter, 24.

[302] Swiss Code on Civil Procedure, Art. 203 (2).

[303] Ibid., Art. 381.

[304] Ibid., Art. 361 (1).

[305] Ibid., Art. 385.

2.3.4 Conclusion on the Domestic Law of Switzerland

Traditionally mediation in Switzerland was not regulated by law at all and even nowadays a wide range of domestic dispute mediation is still not regulated by law, but rather by mediation organizations and by party autonomy. However, recently the Swiss Federal Code on Civil Procedure came into force which includes some legally binding regulations about mediation, especially regarding the issue of the requirement of attempting conciliation to avoid litigation, the issue of suspension of the statute of limitations, the issue of confidentiality of mediation and the issue of enforceability of a (court-annexed) mediation settlement.

The chronological development of the Swiss Code on Civil Procedure mirrors Directive 2008/52/EC. On 21 May 2008 the European Parliament and the Council adopted the Directive and on 19 December 2008 the final version of the first Swiss Federal Code on Civil Procedure was created. Furthermore the European Union Member States were expected to transpose the Directive into their own national law by 21 May 2011 and since 1 January 2011 the Swiss Code on Civil Procedure has been in force. This Swiss Code on Civil Procedure does not distinguish between domestic and cross-border disputes. Thus those regulations are valid for domestic dispute mediations as well as cross-border dispute mediations.

Regarding the two different approaches, the “monistic approach” and the “dualistic approach”, it has to be clearly stated that “approach” does not describe the process of implementation of a Directive, but generally any legislative handling of a legal issue. Thus, Switzerland follows a “monistic approach” regarding the legislation of mediation.

In summary, the chronological development of the legal landscape of domestic dispute mediation in Switzerland is very similar to a development of the legal landscape of domestic dispute mediation that could have been in European Union Member States which implemented Directive 2008/52/EC by the monistic approach. However, Switzerland is not a Member State of the European Union and Directive 2008/52/EC does not apply there.

The new Code on Civil Procedure extended the area of application of mediation especially in relation to court proceedings, and that will draw more attention to the use of mediation.

2.4 Comparison of the Domestic Laws of Germany, Scotland and Switzerland

Standing back and reflecting on the analysis of the three legal systems, one can see certain differences in their domestic laws regulating domestic dispute mediation, but even more similarities in their practice of mediation.

In Germany mediation is legally defined by the German Mediation Act and thus is binding in respect of any mediation in Germany after 21 July 2012. In contrast, in Scotland there is no primary legislative basis defining mediation at all[306] and definitions of mediation, for example by the main mediation organizations[307], are not binding by law. Similarly, in Switzerland definitions of mediation do exist, for example by the Swiss Federal Council,[308] but those definitions are not binding by law either.[309] Besides these differences, mediation in practice in each of the legal systems examined is seen as a process where an independent or impartial third person without any decision- making power helps parties to resolve a dispute, so problems that might emerge from the differences in the definitions just seem to be theoretical.

With regard to the education of a mediator, the German Mediation Act sets out ("general and vague"[310], but legally binding) regulations.[311] However, no formal accreditation is required so far to act as mediator in Germany. In Scotland there is no legally mandatory accreditation system, so anyone may act as a mediator. In practice, the main mediation organizations set out accreditation standards. This is also the position in Switzerland for out-of-court mediation and for court-annexed mediations with regard to the Federal level; with regard to Canton law different requirements about the qualifications of a mediator in connection with a court proceeding may exist.

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[306] Crawford, Carruthers, Volume I, 516.

[307] cf. Code of Practice for Mediation in Scotland, Adopted by the Board of the Scottish Mediation Network on 19.11.08 and B. Gill, *Gill Report*, 167.

[308] Message on the Swiss CCP, 7335.

[309] Kumpan, Bauer-Bulst, 1204.

[310] Bach, Gruber, Volume I, 168.

[311] German Mediation Act, Section 5 (1).

A mediator in Germany has to be independent and impartial[312] and does not have any decision-making power.[313] Those attributes are also legally binding by the German Mediation Act. Neutrality, independence and the lack of decision-making power characterize a mediator in Scotland[314] and in Switzerland[315] too, although those attributes are not legally binding there. In Switzerland, with regard to Canton law, different requirements in connection with a court proceeding may exist.

Regarding the legal outcomes of mediation, successful mediation in Germany,[316] as well as in Scotland[317] and in Switzerland[318] usually ends with a mediation settlement, which is intended to operate as a contract and thus has to be fulfilled in accordance with the rules of Contract Law[319] and Swiss Obligation Law. There are further possibilities for execution of this agreement to make it enforceable per se in each country. In each of the legal systems examined, mediation may have the effect of suspending the statute of limitations and court proceedings may remain suspended automatically or upon request of the parties. However, there are differences between the legal systems examined as regards the requirements regarding those issues, which range from any kind of negotiation[320] up to court-annexed mediations.[321]

Confidentiality of mediation is safeguarded by law in Germany[322] and in Switzerland[323], whereas in Scotland (except in family mediations)[324] "confidentiality of mediation is not

[312] German Mediation Act, Section 1 (2).

[313] Ibid.

[314] Code of Practice of the Scottish Mediation Network.

[315] Message on the Swiss CCP, 7335.

[316] Proksch, 57.

[317] Gill Report, 169.

[318] Peter, 17.

[319] German Civil Code, Section 241.

[320] German Civil Code, Section 203.

[321] cf. Crawford and Carruthers, *United Kingdom I*, 533, referring to: Arbitration (Scotland) Act 2010, Section 10 (1).

[322] German Code of Civil Procedure, Section 385 (2).

[323] Swiss Code on Civil Procedure, Art. 166 (1) d, Art. 216 (1).

currently guaranteed by any legislation".[325] In practice mediators regularly bind themselves by a Code of Practice for Mediation which requires confidentiality,[326] and parties regularly bind themselves by confidentiality clauses included in the mediation agreement. In practice in Germany consequences for breaching the duty of confidentiality usually only arise out of the contract between either the parties themselves or between the parties and the mediator.

2.5 Conclusion

In summary the (main) difference among the mediation systems examined with regard to domestic dispute mediation is in the source of the regulations, e.g. who made the regulations and how binding they are.

Germany regulates mediation mainly by federal law and thus those regulations are mandatory all over Germany. Switzerland regulates mediation partly by law (Federal and Cantonal) and partly by private mediation organizations (not legally binding). In Scotland most regulations are set by private mediation organizations and thus are not binding by law at all. However, the practice of mediation is nearly the same in all the legal systems examined.

Even more interesting than the current status of those regulations is their development particularly with regard to Directive 2008/52/EC.

In Germany the regulations about domestic dispute mediation became legally binding with the implementation of Directive 2008/52/EC. By the monistic approach, Germany transposed Directive 2008/52/EC into national law, valid for domestic dispute mediations as well as for cross-border dispute mediation. Thus, although Directive 2008/52/EC does not (mandatorily) apply to domestic dispute mediations, this Directive had an (indirect) impact on the legal landscape of domestic dispute mediation in Germany.

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[324] Civil Evidence (Family Mediation) (Scotland) Act 1995, Chapter 6.

[325] Tuddenham, No. 5c.

[326] Code of Practice of the Scottish Mediation Network.

In contrast, there has been no change in the regulations about domestic dispute mediation in Scotland with the implementation of Directive 2008/52/EC. By the dualistic approach, Scotland implemented Directive 2008/52/EC only in regard to cross-border disputes. Thus, this Directive had no impact on the legal landscape of domestic dispute mediation in Scotland.

In Switzerland, again, some legally binding regulations about domestic dispute mediation have been created recently, but it is speculative whether this development is connected with an (if at all indirect) impact of Directive 2008/52/EC. The parallel chronological development of the Swiss Code on Civil Procedure in comparison to Directive 2008/52/EC may suggest such an impact for uncertain reasons as there is no application of European Directives in Switzerland. But then again in the "Message on the Swiss Code on Civil Procedure" no reference to any European legislation is made and the first step to a Swiss Code on Civil Procedure was already taken in the year 2000, by giving the federal level its appropriate competence (before the draft for Directive 2008/52/EC was published).[327] In any case, Switzerland follows a (autonomous) monistic approach and all Swiss regulations are valid for domestic dispute mediations as well as for cross-border mediation.

In conclusion this Chapter has demonstrated that in Germany by implementation by the monistic approach Directive 2008/52/EC has had an (indirect) impact on the legal landscape of domestic dispute mediation, whereas Directive 2008/52/EC has no such impact by implementation by the dualistic approach.

Chapter 3: Cross-border Dispute Mediation

The following chapter will concentrate on the legal background of cross-border dispute mediation. "Cross-border dispute mediation" in this thesis means mediation of "cross-border disputes", by definition of Article 2 of Directive 2008/52/EC, which is as follows:

> "For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:
>
> (a) the parties agree to use mediation after the dispute has arisen;

[327] Message on the Swiss CCP, 7222.

(b) mediation is ordered by a court;

(c) an obligation to use mediation arises under national law; or

(d) for the purposes of Article 5 an invitation is made to the parties".[328]

Furthermore,

> "for the purposes of Articles 7 and 8 a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c)".[329]

For these purposes, "domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001".[330] Regulation (EU) No 1215/2012 "shall repeal Regulation (EC) No 44/2001"[331] with effect from 10 January 2015.[332] From then "references to the repealed Regulation shall be construed as references to Regulation (EU) No 1215/2012 and shall be read in accordance with the correlation table set out in Annex III".[333] Thus Articles 59 and 60 of Regulation (EC) No 44/2001 are replaced by Articles 62 and 63 of Regulation (EU) No 1215/2012,[334] by terms of which the domicile of a natural person will be determined by the law of the Member State where the domicile is alleged to be located[335] and a legal person shall be deemed to be domiciled at the place where it has its statutory seat, or central administration, or principal place of business.[336] In contrast to this legal concept of "domicile", "the notion of `habitual residence` embodied in the rule (Article 2

[328] Directive 2008/52/EC, Article 2 (1).

[329] Ibid., Article 2 (2).

[330] Ibid., Article 2 (3).

[331] Article 80, Regulation (EU) No 1215/2012.

[332] Ibid., Article 81.

[333] Ibid., Article 80.

[334] Ibid., Annex III.

[335] Article 62, Regulation (EU) No 1215/2012, former Article 59, Council Regulation (EC) No 44/2001.

[336] Article 63, Regulation (EU) No 1215/2012, former Article 60 (1), Council Regulation (EC) No 44/2001.

of Directive 2008/52/EC) refers to a mere fact"[337], i.e. where somebody in practice physically stays for a considerable time period.

Switzerland is not affected by this definition of cross-border disputes and by the scope of application of Directive 2008/52/EC. Thus the following chapter will be separated into two parts: The European Union Position (e.g. the legal background of cross-border dispute mediation of Germany and Scotland) and the Swiss Position.

3.1 The European Union Position

Simplified practical examples of "cross-border dispute mediation" in the sense of Directive 2008/52/EC would be if a French holidaymaker disputes with a Spanish hotelier about the hotel bill, or if an Austrian party / consumer orders goods from an Italian producer which are damaged in the course of delivery, or if a Swede has a car accident with a Croat on their vacation in Greece, and if those disputing parties undergo mediation (initiated in the sense of Article 2 of Directive 2008/52/EC).

In summary, cross-border dispute mediations share the fact that the parties come from different countries, usually with different legal systems. To settle these legal differences the parties shall "rely on a predictable legal framework" of (cross-border) mediation.[338] Therefore the goal of the Directive 2008/52/EC is to reach a highly "harmonised set of rules on mediation"[339] so it sets out several standards, some strict and mandatory[340], some vague and only permissive.[341]

Concerning harmonization of rules on cross-border dispute mediation this thesis will pay attention only to the strict and mandatory standards set by Directive 2008/52/EC, which are standards ensuring the quality of mediation, the enforceability of agreements resulting

[337] Esplugues, Volume II, 508.

[338] Directive 2008/52/EC, Recital 7.

[339] Esplugues, Volume II, 510.

[340] cf. for example Article 8, Directive2008/52/EC.

[341] cf. for example Ibid., Article 5 (1).

from mediation, the effect of mediation on limitation and prescription periods and the confidentiality of mediation.[342]

Without anticipating any results it can be said that there are similarities between Germany and Scotland and there are differences between Germany and Scotland. So this part of the thesis will again be separated into two parts: the similarities between Germany and Scotland on the one hand and the differences between Germany and Scotland on the other hand.

3.1.1 Similarities between Germany and Scotland

The similarities between Germany and Scotland result from their status as EU members or unit thereof in consequence of supranational regulations and belong to the topic "Enforceability of Agreements". Altogether, (as in domestic dispute mediation) there are mainly three separate agreements relating to cross-border dispute mediation in Germany[343] and equally in Scotland:[344] an agreement to go to mediation, an agreement to mediate and a mediation settlement.

Before the mediation process begins, there can be an agreement to go to mediation by which the parties oblige themselves to undergo mediation because of a concrete dispute. Thus the agreement to go to mediation is a contract between the parties themselves.

Mediation usually starts with an agreement to mediate. This agreement includes the concrete content and process of the mediation, the expected costs and the duties of the mediator. Thus the agreement to mediate is a contract between the parties on the one hand and the mediator on the other.

Successful mediation usually ends with an agreed solution, the mediation settlement, by which the parties oblige themselves to put their arrangement into effect. Thus the mediation settlement is a contract between the parties themselves.

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[342] Directive 2008/52/EC, Article 4-8.

[343] Hutner, 11 et seq.

[344] Crawford, Carruthers, Volume II, 465 et seq.

If a domestic (a purely internal) dispute (with no conflict of laws element) was mediated in Germany, usually those agreements would be governed by the rules of German contract law.[345] Similarly in a domestic (a purely internal) dispute (with no conflict of laws element) in Scotland those agreements would usually be seen as contracts governed by Scottish law.[346] In cross-border cases the governing law regarding those agreements has to be separately determined.

In Germany this law would generally be determined by the Introductory Act to the German Civil Code. However, this Introductory Act claims if "rules of the European Community in their respective pertaining version" are immediately applicable that those rules are relevant.[347] In this international contractual nexus, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereinafter "Rome I Regulation") is relevant.[348]

Similarly in Scotland per the Contracts (Applicable Law) Act 1990 (which enacted the Rome Convention into Scottish law) the Rome I Regulation, which supersedes the Rome Convention, will apply.[349]

The Rome I Regulation was created by the European Parliament and the Council "for the progressive establishment of a (European) area (of justice)…(to produce) measures relating to judicial cooperation in civil matters with a cross-border impact"[350] and "to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments".[351]

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[345] cf. A. Hutner, Das internationale Privat- und Verfahrensrecht der Wirtschaftsmediation,11, and Bach and Gruber, Germany, 164 and 172.

[346] Crawford, Carruthers, Volume II, 465 et seq.

[347] cf. Introductory Act to the German Civil Code, Art. 3.

[348] Ibid., Art. 3 No. 1 (b).

[349] cf. 2 (a) (1) Law Applicable to Contractual Obligations (Scotland) Regulations 2009.

[350] cf. Recital (1), Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation).

[351] Ibid., Recital (6).

The Rome I Regulation (in general) shall apply in Germany as well as in Scotland, "in situations involving a conflict of laws, to contractual obligations in civil and commercial matters".[352]

The three separate agreements relating to mediation constitute contracts regulating such obligations as just examined. By definition of Article 2 of Directive 2008/52/EC, the parties to cross-border dispute mediation are domiciled or habitually resident in different states, with different legal systems. As a consequence, at least one of the parties is also domiciled or habitually resident in a different state than the mediator. So in each of the agreements, either between the parties themselves or between the parties and the mediator, a conflict of laws exists.

Thus, the Rome I Regulation shall determine the applicable law of the agreement to go to mediation, the agreement to mediate and the mediation settlement in cross-border mediations. However, there are several exclusions to this general regulation,[353] so the application of the Rome I Regulation has to be particularly checked and each of these agreements has to be examined separately as each of these agreements may have to be treated differently.

3.1.1.1 The Agreement to go to Mediation

In Germany (as examined above under 2.1.1.5) as well as in Scotland (as examined above under 2.2.1.2) before the mediation process begins, there can be an agreement to go to mediation.

"Arbitration agreements and agreements on the choice of court" are excluded from the scope of the Rome I Regulation.[354] On the one hand, it could be argued that this exclusion also extends to the agreement to go to mediation as mediation is also a form of conflict resolution like arbitration and court proceedings. Arbitration and court proceedings, on the other hand, are strictly to be distinguished from mediation by the characteristic of the missing decision-making-power in mediation. The very clear formulation of Article 1.2 (e)

[352] Rome I Regulation, Article 1.1.

[353] Ibid., Article 1.2.

[354] Ibid., Article 1.2 (e).

of the Rome I Regulation excludes only "arbitration agreements and agreements on the choice of court" and does not mention alternative dispute resolution clauses or mediation clauses.[355] Thus, Article 1.2 (e) of the Rome I Regulation expressly (just) excludes dispute resolutions with decision-making-power and not without such power.

Furthermore, regulating the agreement to go to mediation by the Rome I Regulation in every participating country uniformly helps the aim of unifying the area of justice.[356] So the agreement to go to mediation should not be qualified as arbitration agreement in the sense of the Rome I Regulation and thus it should not *generally* be excluded from the scope of the Rome I Regulation.

However, in some cases the agreement to go to mediation should be excluded from the scope of the Rome I Regulation. By an agreement to go to mediation the parties oblige themselves to undergo mediation because of a concrete dispute, so there is a close connection between this dispute and the agreement to go to mediation.[357] Certain subjects are excluded from the scope of the Rome I Regulation.[358] Disputes about those subject matters shall not be determined by the Rome I Regulation. If those disputes themselves shall not be determined by the Rome I Regulation, it would be contradictary to determine the agreement to go to mediation by the Rome I Regulation where they pertain to such an excluded dispute, because of their interdependence. Thus, the application of the Rome I Regulation regarding the agreement to go to mediation shall be assessed in the same way as the subject matter in dispute itself. So "an agreement to go to mediation in respect of a Rome I (Regulation)-excluded matter conceivably should…not (be regulated) by the Rome I Regulation" [359] Then such an agreement to go to mediation in Germany would be determined by the Introductory Act to the German Civil Code[360] and in Scotland it would

[355] cf. U. P. Gruber and I. Bach, *Germany*, in: Esplugues, Carlos (ed.), Civil and commercial Mediation in Europe, Cross-Border Mediation, Volume II (Cambridge, 2014), 159 et seq.

[356] Rome I Regulation, Recital (1).

[357] Crawford, Carruthers, Volume II, 467.

[358] Rome I Regulation, Article 1.2.

[359] Crawford, Carruthers, Volume II, 467.

[360] cf. Art. 3 Introductory Act to the German Civil Code.

be regulated by pre-existing national choice of law rules, which "would be the law of the place where the mediation is to be undertaken (the lex loci solutionis)."[361]

Apart from those excluded matters the agreements to go to mediation (generally) shall attract the application of the Rome I Regulation. According to that, the agreement to mediate (with regard to some exceptions)[362] "shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract."[363] In cases where no law has been chosen, this law is usually determined by Article 4 of the Rome I Regulation.

3.1.1.2 The Agreement to mediate

Mediation in Germany (as examined above under 2.1.1.5) and in Scotland (as examined above under 2.2.1.2) usually starts with an agreement to mediate. In contrast to the agreement to go to mediation, which is a contract between the parties themselves with close connection to the subject matter in dispute, the agreement to mediate is a contract between the parties on the one hand and the mediator on the other about the duties of the mediator and the concrete process of the mediation. This agreement to mediate (just) regulates the formal procedure of the mediation (between the parties on the one hand and the mediator on the other) and does not directly influence the subject matter in dispute (which is between the parties themselves).

The agreement to mediate has no direct connection to the subject matter in dispute and thus the application of the Rome I Regulation regarding the agreement to mediate shall not be assessed in the same way as the subject matter in dispute. As a result, an excluded subject matter in dispute does not exclude the agreement to mediate from the scope of the Rome I Regulation.

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[361] Crawford, Carruthers, Volume II, 467.

[362] Rome I Regulation, Article 3.3 and 3.4.

[363] Ibid., Article 3.1.

The agreement to mediate has to be assessed separately. Regulations about the formal procedure of mediation are not excluded from the Rome I Regulation,[364] so the agreement to mediate is not excluded from the scope of the Rome I Regulation and thus "it would be beneficial for agreements to mediate to be governed by (the) Rome I (Regulation)".[365]

The agreement to mediate generally shall be governed by the law chosen by the parties[366] and where no governing law has been chosen, the law is usually determined by Article 4 of the Rome I Regulation. Then the mediator would have to be seen as some kind of service provider and, as the agreement to mediate determines the duties of the mediator, it would have to be "classified as a service contract".[367] Therefore, it would be governed by the law of the country where the mediator has his habitual residence[368] or by the law of the country with which it is most closely connected.[369] That would usually be the place where the mediation takes place. This seems to be a preferable solution as it is clear for all participants of a mediation, where it takes place.

The situation changes if a party to the agreement to mediate is a natural person acting "outside his trade or profession", because this party has to be seen as "consumer".[370] Then the mediator has to be seen as a "professional", because he is acting "in the exercise of his trade or profession".[371] Thus those agreements to mediate would have to be classified as "consumer contracts" and "be governed by the law of the country where the consumer (e.g. the party) has his habitual residence, provided that the professional (the mediator) pursues his commercial or professional activities in the country where this party has his habitual residence, or by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities".[372]

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[364] Rome I Regulation, Article 1.2.

[365] Crawford, Carruthers, Volume II, 469.

[366] Rome I Regulation, Article 3.1.

[367] Gruber, Bach, Volume II, 173.

[368] Ibid., Article 4 I (b).

[369] Ibid., Article 4.4.

[370] Ibid., Article 6. 1.

[371] Ibid., Article 6. 1.

[372] Ibid., Article 6. 1.

3.1.1.3 The Mediation Settlement

Successful mediation in Germany (as examined above under 2.1.1.6) and in Scotland (as examined above under 2.2.1.3) usually ends with the mediation settlement. This settlement is an agreed solution in the form of a contract between the parties, regulating the subject matter in dispute itself.

Thus, it depends on the substantive nature of the dispute whether the mediation settlement is governed by the Rome I Regulation or whether it is excluded.[373] If the dispute does not pertain to a subject mentioned in Article 1(2) of the Rome I Regulation (i.e. an excluded matter) the mediation settlement will be judged by the Rome I Regulation. In that case, usually the governing law is expressly chosen by the parties[374] or, in the absence of such a choice, it is determined by Article 4 of the Rome I Regulation.

If the dispute pertains to an excluded matter, the mediation settlement would be excluded from the scope of the Rome I Regulation and then it would, in Germany, be determined by the Introductory Act to the German Civil Code,[375] and, in Scotland, it "must be determined instead, by application of the forum's pre-existing national choice of law rules in contract"[376] and the governing law is determined by common law principles.[377]

Even more interesting than the determination of the governing law is the topic of "enforceability of agreements resulting from mediation". By Directive 2008/52/EC,

> "1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.
>
> 2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an

[373] Crawford, Carruthers, Volume II, 470.

[374] Rome I Regulation, Article 12 (1).

[375] cf. Art. 3 Introductory Act to the German Civil Code.

[376] Crawford, Carruthers, Volume II, 470.

[377] Ibid., 479.

> authentic instrument in accordance with the law of the Member State where the request is made.
>
> 3. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 2.
>
> 4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1."[378]

Thus, Directive 2008/52/EC requires the enforceability (just) of mediation settlements of cross-border mediations.

Considering the domestic situation, there are several possibilities in Germany (as examined above under 2.1.1.6) and in Scotland as well (as examined above under 2.2.1.3) to give a mediation settlement the effect of an authentic instrument, a court settlement or a judgment to make it enforceable.

Considering the cross-border situation, there are also several possibilities to make such a mediation settlement enforceable in other States:[379]

Within the European Union, in civil and commercial matters, a document that is enforceable in one Member State of the European Union shall (generally) be declared enforceable in other Member States, too.[380] Equally, the mediation settlement of a court-annexed mediation can be transposed into a court-endorsed settlement. That brings the same enforceability within the European Union.[381] Generally, within the European Union, "judgments, court settlements and authentic instruments or uncontested claims"[382] of one Member State are enforceable within the whole European Union (under certain requirements).[383] Similar regulations exist in the context of cross-border maintenance

[378] Directive 2008/52/EC, Article 6.

[379] Crawford, Carruthers, Volume II, 480 et seq.

[380] Article 58 (1), Regulation (EU) No 1215/2012, former Article 57 (1), Council Regulation (EC) No 44/2001, 22.12.2000.

[381] cf. Articles 59 and 60, Regulation (EU) No 1215/2012, former Article 58, Council Regulation (EC) No 44/2001.

[382] Article 3 (1), Regulation (EC) No 805/2004 of the European Parliament and of the Council, 21.04.2004.

[383] Ibid., Article 11.

applications arising from family relationships within the regulations of the Council Regulation (EC) 4/2009.[384]

Insertion:

> With regard to the enforceability of German or Scottish agreements in non-Member States of the European Union (which is not "cross-border" by definition of Article 2 of Directive 2008/52/EC), there can be multinational or bilateral conventions on recognition and enforcement of executory titles and court decisions.
>
> One of those multinational conventions, for example, is the New York Convention. [385] Because international arbitration became more and more important to settle international commercial disputes this "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" was brought into force on 7 June 1959[386] and it applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.[387] Thereby non-domestic arbitral awards shall not be discriminated against, but generally be recognized as binding and enforceable in accordance with the rules of procedure of the territory where the award is relied upon[388] as long as the arbitral award is within the arbitrator's jurisdiction, the arbitration meets the minimal standards of fairness, the award is something amenable to arbitration, and the award does not violate public policy in the state where it is to be enforced.[389] Germany and the UK (and thus Scotland as part of the UK) are party to the New York Convention.[390] Thus German or Scottish pure mediation settlements that are transformed into the form of an arbitration award would not just be enforceable

[384] Council Regulation (EC) 4/2009, 18.12.2008.

[385] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10.6.1958.

[386] Ibid., Article XII.

[387] Ibid., Article I.

[388] Ibid., Article III.

[389] Ibid., Article V.

[390] cf. List of the New York Convention Countries, available at "http://www.newyorkconvention.org/contracting-states/list-of-contracting-states", site visited on 12 March 2014.

in Germany or Scotland, but in all of the 149 contracting states of the New York Convention.[391]

Further important multinational conventions applying to Germany and the UK are the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters by which authentic instruments or settlements can be enforceable in all contracting states,[392] and the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance[393], regulating the enforcement of such settlements.

3.1.2 Differences between Germany and Scotland

The similarities between Germany and Scotland just examined result from supranational European regulations or international conventions. Regarding the further mandatory standards set by Directive 2008/52/EC about the quality of mediation, the effect of mediation on limitation and prescription periods and the confidentiality of mediation[394], no such supranational regulations exist.

3.1.2.1 Quality of Mediation

By Directive 2008/52/EC,

> "1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organizations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.

[391] Convention on the Recognation and Enforcement of Foreign Arbitral Awards, Article III.

[392] Article 57 of the New Lugano Convention, 30.10.2007.

[393] Article 20, Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, 23 November 2007.

[394] Directive 2008/52/EC, Articles 4, 7 and 8.

> 2. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties."[395]

Although Member States shall take care of the quality of mediation, those requirements are not really strict, as they do not include measurable standards or binding methods. "Encouraging" leaves a wide range of possibilities and the formulation "by any means which they consider appropriate" is even more open (regarding the issues to which this formulation refers).

3.1.2.1.1 Germany

The German Mediation Act, as implementation of Directive 2008/52/EC, contains regulations about the "training of mediators" and thus the quality of mediation. In summary, a mediator has to ensure that he has received appropriate training, and that he regularly participates in continuing education fulfilling the requirements of section 5 (1) Mediation Act (examined above under 2.1.1.2, as those regulations are also valid for domestic dispute mediations).

As those regulations may be different in Germany than in many other European states, they may cause problems in cross-border disputes, because a foreign mediator might not have the education the German Law may require. It "seems reasonable to assume, that…even mediators seated in another Member State must adhere to the Mediation Act`s educational requirements when they offer their services in Germany, the parties (or at least one of them) have their habitual residence/seats in Germany and the mediation`s effects will occur in Germany."[396]

Although the German Mediation Act sets out several requirements concerning the education and training of mediators, "the Mediation Act itself contains no further details - either in regard to the initial mediation training or in regard to the continuing education".[397] Thus, it would be hard to determine exactly how well the requirements concerning the education of mediators as per the Mediation Act could be satisfied by a foreign education,

[395] Directive 2008/52/EC, Article 4.

[396] Gruber, Bach, Volume II, 170.

[397] Ibid., 169.

as those requirements are “too vague as to allow any practical impact”[398], in particular since section 5 (1) Mediation Act makes it the responsibility of the mediator himself to ensure that he does fulfill those requirements.[399]

That vagueness of the requirements as to the education of mediators might change, as soon as the title “Certified Mediator” is in use[400] (examined above under 2.1.1.3). Therefore the Federal Ministry of Justice is authorised to issue regulations governing the training and continuing education of Certified Mediators[401] and the recently created (first) draft for such regulations for example requires a vocational education or a university degree, two years of professional experience and an education as mediator to the extent of at least 120 hours.[402] In summary, as this draft includes measurable standards, it is to be expected that the final regulations will also be detailed and measurable then.

Thus, the questions whether a mediator domiciled in another State will be allowed to use the designation “Certified Mediator” (i.e. a German law accreditation) “if he has completed an education in his home country that matches the requirements of the (forthcoming) Federal Ministry of Justice regulations”,[403] is a matter of speculation at present, but according to the proposal of the Legal Affairs Committee of the 17th German Parliament[404] for the Mediation Act a foreign education should be accepted as equal to a German education, so one can assume that the foreign mediator may use this designation. In any case, even the proposed title "Certified Mediator" will not have any legal consequences itself[405] and thus even these detailed regulations will have no consequences for foreign mediators in the sense of being allowed to act as mediator in Germany or not. In summary, the German Mediation Act does not set any requirements with regard to

[398] Gruber, Bach, Volume II, 169.

[399] Ibid., 169 et seq.

[400] German Mediation Act, Section 5 (2).

[401] Ibid., Section 6.

[402] Draft Regulation for the Education of Certified Mediators, Section 2 and 3.

[403] Gruber, Bach, Volume II, 170.

[404] cf. Drucksache 17/8058 des Deutschen Bundestag, 20.

[405] Ahrens, 2467.

education and training of mediators that would prevent a foreign mediator from acting as a mediator in Germany.

Besides the Mediation Act there might be another law which could prohibit (most) foreign mediators from working in Germany, namely the German Legal Services Act.[406] This law requires permission to offer legal services in Germany,[407] which in practice means that one has to be educated as a judge in Germany (or an education recognized as equal) to offer legal services. Thus, the Legal Services Act might only permit people to serve as mediators in Germany with such an education.[408] This might even be valid if the parties have their habitual residence or seats in Germany or if the effects of the mediation will occur in Germany.[409]

The connection of this German Legal Services Act particularly to cross-border dispute mediation results from the presumption that a mediator who does not reside in Germany generally does not have this special (German) education. Thus, a foreign mediator would not be eligible to act as a mediator in Germany if this Legal Services Act applies to mediation. Although this presumption is obvious in respect of foreign mediators, some mediators in Germany are not educated in law either, but in psychology or social science.[410] There has always been discussion in Germany whether those mediators are prohibited to act in Germany.[411]

The crucial question is whether the German Legal Services Act applies to mediation.[412] As the German Legal Services Act requires permission to offer "legal services" in

[406] German Legal Services Act, 12.12.2007.

[407] Ibid., Section 3.

[408] Gruber, Bach, Volume II, 163.

[409] Ibid., 170.

[410] cf. L. Montada and E. Kals, Mediation: Psychologische Grundlagen und Perspektiven, 3rd edition, (Weinheim, 2013), 20.

[411] cf. P. Tochtermann, *Zur Zulässigkeit der nicht-anwaltlichen Mediation nach dem German Legal Services Act,* in: Zeitschrift für Konfliktmanagement, Volume 10, Issue 1, (Köln 2007), 4.

[412] Gruber, Bach, Volume II, 163 et seq.

Germany[413], the core of this question is: Is mediation a legal service in the sense of the German Legal Services Act?

This topic goes back to the former German Legal Advice Act which claimed that "taking care of any type of legal matter concerning another person needs permission" from the proper authority.[414] This formulation was extremely wide and it was partly considered that mediation was such a type of legal matter.[415]

In 1 July 2008 this former Legal Advice Act was replaced by the Legal Services Act, which no longer claims that "taking care of any type of legal matters needs permission",[416] but only "offering legal services in Germany needs permission"[417] under the control of the state department of justice.[418] In contrast to the wide formulation of the former Legal Advice Act the formulation of the new Legal Services Act is more precise and the new Legal Services Act particularly defines that mediation is not a legal service, as long as the mediator does not influence the parties by giving legal advice.[419]

Although a mediator in Germany must ensure that the parties to an agreement are aware of all relevant facts, he does not have to give legal advice by himself, because he can suggest the use of external advisers if necessary.[420] Instead of giving concrete legal advice, a mediator in Germany should use external advisers so as not to come into conflict with the German Legal Services Act and the German Mediation Act as well, which claims that the mediator has to be independent and impartial and does not have any decision- making power.[421]

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[413] German Legal Services Act, Section 3.

[414] cf. Article 1, Rechtsberatungsgesetz (German Legal Advice Act), 13.12.1935.

[415] Tochtermann (Köln 2007), 4.

[416] cf. German Legal Advice Act, Article 1.

[417] German Legal Services Act, Section 3.

[418] Ibid., Section 19 (1).

[419] German Legal Services Act, Section 2 Satz 3 No. 4.

[420] German Mediation Act, Section 2 (6).

[421] Ibid., Section 1.

In summary, as long as a mediator gives general legal information, but no concrete resolution to the dispute, and as long as the parties autonomously decide their dispute, mediation is not a legal service in the sense of the Legal Services Act[422] and this law does not apply.

Thus a mediator in Germany, as long as he keeps to the principles of mediation manifest in the Mediation Act, does not offer a legal service and therefore he does not need permission in the sense of the Legal Services Act, no matter where he is resident.

There are no further formal requirements or certifications mandatory to act as mediator in Germany, which is also valid without any restrictions with regard to foreign mediators. Therefore, generally, persons domiciled outside Germany may act as mediators in Germany as well.[423]

3.1.2.1.2 Scotland

Regarding the (not really strict or measurable) requirements of Directive 2008/52/EC about the quality of mediation, "the pre-existing arrangements in Scotland already complied with (those requirements) and so no further implementation was required."[424] As examined above under 2.2.1.1, the main Scottish mediation organizations set out accreditation standards[425], which in practice fulfil these requirements.

Accreditation is not mandatory and there is no single scheme in Scotland "regulating the legal capacity of persons to act as a mediator".[426] The accreditation standards of the main Scottish mediation organizations[427] are not mandatory by law, so there are no formal requirements to qualify a person to act as a mediator in cross-border disputes. Any foreign

[422] German Legal Services Act, Section 2 Satz 3 No. 4.

[423] Gruber, Bach, Volume II, 168.

[424] Crawford, Carruthers, Volume I, 526.

[425] Guidance Notes for Application of the Law Society of Scotland, 1.

[426] Crawford, Carruthers, Volume II, 477.

[427] Guidance Notes for Application of the Law Society of Scotland, 1.

mediator may act as a mediator in the mediation of a cross-border dispute in Scotland without fulfilling any requirements about qualifications or training.[428]

3.1.2.2 Effect of Mediation on Limitation and Prescription Periods

Regarding the effect of mediation on limitation and prescription periods, by Directive 2008/52/EC,

> "1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.
>
> 2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party."[429]

3.1.2.2.1 Germany

Considering the domestic situation the German lawmakers never saw any need to regulate the question of limitations especially for mediation[430] as Section 203 of the German Civil Code already regulated the suspension of limitation in the case of negotiations, including mediations. With regard to cross-border dispute mediations, German lawmakers did not especially have to regulate this topic, either, as Section 203 of the German Civil Code is also valid for cross-border dispute mediations. Thus "if (cross-border mediations)…are in progress…the limitation period is suspended until one party or the other refuses to continue the negotiations. The claim is statute-barred at the earliest three months after the end of the suspension."

[428] Crawford, Carruthers, Volume I, 530.

[429] Directive 2008/52/EC, Article 8.

[430] Gesetzentwurf (Draft), German Mediation Act, 1.

3.1.2.2.2 Scotland

Scotland implemented the requirement of Directive 2008/52/EC regarding limitation or prescription periods by amending prescription and limitation periods in primary legislation, mainly in the Prescription and Limitation (Scotland) Act 1973.[431] Thus, an imminent expiration of a prescription or limitation period during a cross-border dispute mediation will be extended until eight weeks after the end of that mediation without prejudicing the possibility to go to court.[432]

Those implementations are only relevant for cross-border dispute mediations, not for domestic dispute mediations, and cross-border dispute in the sense of those regulations "means a cross-border dispute within the meaning given by Article 2 of the Directive" 2008/52/EC.[433]

3.1.2.3 Confidentiality of Mediation

Furthermore, Directive 2008/52/EC provides:

> "1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:
>
> (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
>
> b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.
>
> 2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation."[434]

[431] cf. Regulation 4 of the Cross-Border Mediation (Scotland) Regulations 2011.

[432] Ibid., Regulation 5 and 6.

[433] Ibid., Regulation 5 (3) b and 6 (4).

[434] Directive 2008/52/EC, Article 7.

Generally mediators and persons involved in the administration of the (cross-border dispute) mediation process shall (at least) have a right to retain confidentiality in a court or arbitration proceeding, about information in connection with a relevant mediation, unless the parties agree otherwise (or where there is a relevant exception mentioned in Article 7 (1) of Directive 2008/52/EC).

3.1.2.3.1 Germany

As examined for domestic dispute mediation, in Germany the mediator (and also persons involved in the administration of the mediation process) have the right to refuse to testify on personal grounds by the German Code of Civil Procedure. Those regulations apply to cross-border dispute mediations as well. Thereby "persons are entitled to refuse to testify…to whom facts are entrusted, by virtue of their office, profession or status, the nature of which mandates their confidentiality, or the confidentiality of which is mandated by law, where their testimony would concern facts to which the confidentiality obligation refers".[435] They "may not refuse to testify wherever they have been released from their confidentiality obligations".[436]

In addition to this right to refuse to testify the Mediation Act even obliges the duty of confidentiality:

> "The mediator and the persons involved in conducting the mediation process shall be subject to a duty of confidentiality unless otherwise provided by law. This duty shall relate to all information of which they have become aware in the course of performing their activity. Notwithstanding other legal provisions regarding the duty of confidentiality, this duty shall not apply where
>
> 1. disclosure of the content of the agreement reached in the mediation process is necessary in order to implement or enforce that agreement,
>
> 2. disclosure is necessary for overriding considerations of public policy (ordre public), in particular when required to avert a risk posed to a child's well-being or to prevent serious harm to the physical or mental integrity of a person, or
>
> 3. facts are concerned that are common knowledge or that are not sufficiently significant to warrant confidential treatment.

[435] German Code of Civil Procedure, Section 383 (1) No. 6.

[436] Ibid., Section 385 (2).

> The mediator shall inform the parties about the extent of his duty of confidentiality."[437]

With regard to cross-border dispute mediation and the Rome I Regulation, section 4 of the German Mediation Act guaranteeing confidentiality should "be classified as overriding mandatory provision."[438] So confidentiality in the sense of the Mediation Act[439] can be described as basic principle which should also be applied even if the contract is governed not by German law.[440] Thus, a German court would safeguard the duty of confidentiality by applying section 4 of the German Mediation Act even if it had to judge the case by foreign law.

3.1.2.3.2 Scotland

Scotland guaranteed the confidentiality of mediation in the way that

> "(1) A mediator of, or a person involved in the administration of mediation in relation to, a relevant cross-border dispute is not to be compelled in any civil proceedings or arbitration to give evidence, or produce anything, regarding any information arising out of or in connection with that mediation.
>
> (2) Paragraph (1) does not apply
>
> (a) where all the parties to the mediation agree otherwise; or
>
> (b) in the circumstances set out in paragraph (a) or (b) of Article 7.1 of the Directive."[441]

Thus, Scotland (just) exactly implemented the requirements set out by Directive 2008/52/EC regarding confidentiality and just concerning "relevant cross-border disputes".

[437] German Mediation Act, Section 4.

[438] Gruber, Bach, Volume II, 173.

[439] German Mediation Act, Section 4.

[440] Rome I Regulation, Article 9.

[441] cf. Regulation 3 (1) of the Cross-Border Mediation (Scotland) Regulations 2011.

3.1.3 Conclusion

It can be noted that both Germany and Scotland partly already complied with the requirements of Directive 2008/52/EC before and thus did not need to especially implement every provision of this Directive. However, Germany and Scotland have implemented Directive 2008/52/EC regarding the issues which had not been in accordance with Directive 2008/52/EC before, though each legal system took a different approach to implementation.

The German implementation of Directive 2008/52/EC was mainly the Mediation Act, which is not restricted in its application to cross-border disputes, but extends to any mediation. Additionally, Germany changed and extended some provisions of the Code of Civil Procedure. This law also applies to any mediation. Generally, Germany does not distinguish between domestic dispute mediation and cross-border dispute mediation, but treats them equally. This is what can be called the monistic approach.

In contrast, in Scotland the implementation of Directive 2008/52/EC has taken place by the Cross-Border Mediation (EU Directive) Regulations 2011. These Regulations apply only in respect of mediations relating to cross-border disputes[442] in the meaning given by Directive 2008/52/EC[443] and do "not extend to domestic mediations or to mediations between parties based within the separate jurisdictions of the United Kingdom"[444] and as Article 2 of Directive 2008/52/EC defines a cross-border dispute as one between parties domiciled or habitually resident in (different) Member States[445] the Regulations do not extend to mediations between parties domiciled or habitually resident in a Third State either. (Those "fully international mediations" fall outside the EU scheme of mediation regulation.[446]) This is what can be called the dualistic approach.

[442] cf. The Cross-Border Mediation (EU Directive) Regulations 2011, SSI 2011 No. 234, Part 1 No. 8 (i).

[443] Ibid., No. 8 (b).

[444] cf. Explanatory Memorandum to the Cross-Border Mediation (EU Directive) Regulations 2011, SI 2011 No.1133, 4.2.

[445] Directive 2008/52/EC, Article 2 No. 1.

[446] Crawford, Carruthers, Volume I, 523.

3.2 The Swiss Position

Neither the standards set by Directive 2008/52/EC[447] (according to which the previous part of this chapter was structured), nor the definition of "cross-border" of Article 2 of Directive 2008/52/EC apply to Switzerland. Nevertheless, the subsequent part of this chapter will follow the previous structure to examine the legal background of cross-border dispute mediation (by reference to the definition of Article 2 of Directive 2008/52/EC) in Switzerland, to compare the legal systems.

3.2.1 Enforceability of Agreements

In Switzerland, there are also the three main separate agreements related to mediation: An agreement to go to mediation (in Switzerland this is often done by a mediation clause)[448], an agreement to mediate[449] and a mediation settlement.[450]

3.2.1.1 The Agreement to go to Mediation

In Switzerland an agreement to go to mediation in domestic cases is determined by the rules of Swiss Obligation Law, but in cross-border disputes a different law might apply.

Generally in Switzerland the law applicable in international disputes is determined by the International Private Law of Switzerland[451], as long as there is no international convention regulating the subject matter. [452] There are quite a number of such conventions,

[447] Directive 2008/52/EC, Article 4-8.

[448] cf. Mediation Clauses of the Swiss Chambers' Arbitration Institution.

[449] Code of behaviour for mediators of the Swiss Chamber for Commercial Mediation, 13.10.2007, Section I.2.

[450] Peter, 17.

[451] cf. Art. 1 No. 1 (b), Swiss Federal Act on Private International Law, 1.7.2014.

[452] Ibid., Art. 1 No. 2.

multilateral[453] and bilateral,[454] to which Switzerland is party, but this thesis will concentrate only on the regulations of the International Private Law of Switzerland:

Thus, principally in Switzerland the agreement to go to mediation is determined by the law chosen by the parties.[455] The law has to be chosen expressly or has to be clear from the circumstances.[456] Where no law has been chosen, the agreement to go to mediation will be determined by the law of the state to which it is most closely connected,[457] which shall be the state of the habitual residence of the party required to effect the characteristic performance of the contract.[458] (A characteristic performance within the agreement to go to mediation would be hard to determine, as all parties are required to effect the same performance, going to mediation. Thus, presumably the characteristic performance of the matter in dispute would have to be considered, e.g. disposal[459] or service.[460])

3.2.1.2 The Agreement to mediate

In Switzerland the law applicable to the agreement to mediate in cross-border cases is also generally determined by the IPRG.[461] In contrast to the Rome I Regulation, the Swiss IPRG does not contain any special regulations for service contracts, but special regulations for consumer contracts. However, the IPRG defines a consumer contract as a contract regulating service for "the private daily use of a consumer not in any professional

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[453] cf. List of multilateral contracts of Switzerland, available at http://www.rhf.admin.ch/rhf/de/home/zivil/recht.html, site visited on 16 February 2014.

[454] cf. List of bilateral contracts of Switzerland, available at http://www.eda.admin.ch/eda/de/home/topics/intla/intrea/dbstv/index_c.html, site visited on 16 February 2014.

[455] Swiss Federal Act on Private International Law, Art. 116 No. 1.

[456] Ibid., Art. 116 No. 2.

[457] Ibid., Art. 117 No. 1.

[458] Ibid., Art. 117 No. 2.

[459] Ibid., Art. 117 No. 3a.

[460] Ibid., Art. 117 No. 3c.

[461] Ibid., Art. 1 No. 1 (b).

connection".[462] In general, the agreement to mediate has not to be classified as consumer contract in the sense of the Swiss IPRG, as mediation for the parties will not be for the private daily use if there is no professional connection.

In consequence the agreement to mediate is determined by the general regulations of the Swiss IPRG and thus determined by the law chosen by the parties[463] or, in absence of such a choice, by the law of the state to which it is most closely connected,[464] which in this case would be the state of the seat of the mediator.[465]

3.2.1.3 The Mediation Settlement

Equally, the law applicable to the mediation settlement would be determined by the law chosen by the parties[466] or, in absence of such a choice, by the law of the state with which it is most closely connected,[467] which again shall be the state of the habitual residence of the party required to effect the characteristic performance of the contract.[468]

Besides the determination of the governing law, the topic of enforceability of the mediation settlement of a cross-border dispute in Switzerland is interesting, too. As examined above under 2.3.2.5, in Switzerland there can be the possibility to give a mediation settlement the same effect as a legally binding court decision.[469] As Switzerland is also party to the (new)

[462] Swiss Federal Act on Private International Law, Art. 120 No. 1.

[463] Ibid., Art. 116 No. 1.

[464] Ibid., Art. 117 No. 1.

[465] Ibid., Art. 117 No. 2 and 3.

[466] Ibid., Art. 116 No. 1.

[467] Ibid., Art. 117 No. 1.

[468] Ibid., Art. 117 No. 2.

[469] Swiss Code on Civil Procedure, Art. 217.

Lugano Convention[470] such mediation settlements will be recognized in all contracting states[471] and can be made enforceable in all contracting states.[472]

Furthermore, Switzerland is party to the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance[473], which has similar effects on the enforceability of Swiss mediation settlements in this field of topics in the other contracting states. As Switzerland, since 29 December 1958, has also been one of the contracting states to the New York Convention a Swiss mediation settlement recorded in the form of an award, which is enforceable in Switzerland[474] would also be enforceable in all contracting states. In a similar way, Switzerland is party to a lot of multilateral and bilateral international conventions, which may in the concrete case influence the enforceability of the mediation settlement of a cross-border dispute.

Conversely, foreign judgments will generally be recognized in Switzerland[475] and will be made enforceable upon the request of one party.[476] The same is true for juridical settlements[477] or settlements of voluntary jurisdiction.[478]

3.2.2 Quality of Mediation

Switzerland is unaffected by Directive 2008/52/EC and therefore entirely unaffected by the definition of "cross-border" in Article 2 of the Directive. Thus, in its own rules,

[470] The New Lugano Convention, 1.

[471] Ibid., Article 33.

[472] The New Lugano Convention, Article 38 and article 58.

[473] Article 20, Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, 23 November 2007.

[474] Swiss Code on Civil Procedure, Art. 385.

[475] Swiss Federal Act on Private International Law, Art. 25.

[476] Ibid., Art. 28.

[477] Ibid., Art. 30.

[478] Ibid., Art. 31.

Switzerland does not distinguish between "domestic dispute mediation" and "cross-border dispute mediation".

In consequence, the regulations of the main Swiss mediation organizations regarding the quality of mediation (as examined above under 2.3.1) apply fully to "cross-border" disputes (in the sense of Article 2 of Directive 2008/52/EC). Accreditation of mediators is not mandatory by law (at least on a federal level)[479] and in principle there are no formal requirements to act as a mediator, so any foreign mediator may act as a mediator as well, at least in out-of-court mediation.

The results regarding the Cantonal level, which regulates the organization of the courts and thus the requirements for court-annexed mediators, may differ as some Cantons have established their own requirements for the qualifications of a mediator[480] (examined above under 2.3.2). The Canton of Vaud, for example, requires a mediator to be named in a list of the tribunal which approves that he fulfils the personal requirements to act as mediator in court-annexed mediations.[481] Similar regulations exist in the law of other Cantons as well[482] and those requirements might be hardly fulfilled by foreign mediators. The relevant requirements for a mediator in connection with a court proceeding depend on the Canton where the court proceeding takes place which normally is the place of residence of the defender.[483] It is to be assumed that foreign mediators often will not be able to act as mediators in court-annexed mediations in Switzerland.

3.2.3 Effect of Mediation on Limitation and Prescription Periods

In Switzerland the issue of suspension of the statute of limitations is regulated by the Swiss Code on Civil Procedure and only as long as there is connection to a court procedure. As Swiss law does not distinguish between "domestic dispute mediation" and "cross-border dispute mediation" all regulations about mediation of the Swiss Code on Civil Procedure

[479] Message on the Swiss CCP, 7335.

[480] Peter, 16.

[481] Code de droit privé judiciaire vaudois, Art. 40 I.

[482] Kumpan, Bauer-Bulst, 1233.

[483] Swiss Code on Civil Procedure, Art. 10.

apply to any mediation. In summary, avoiding statutory limitation requires commencing a court proceeding in addition to mediation.[484] The case becomes pending when an application for this (pre-trial) mediation is filed,[485] which suspends the statute of limitations.

In the international context the Swiss IPRG claims that the Limitation and Prescription Periods of a claim are regulated by the same law as the claim itself will be.[486]

3.2.4 Confidentiality of Mediation

Regarding confidentiality of mediation the regulations about mediation of the Swiss Code on Civil Procedure apply equally to "cross-border dispute mediation". Article 216 of the Swiss Code on Civil Procedure protects statements of the parties by guaranteeing confidentiality in mediation[487] and by prohibiting use of those statements in court proceedings.[488] Article 166 of the Swiss Code on Civil Procedure safeguards the confidentiality of a mediator on facts that have come to his or her attention in the course of his or her activities.[489] Thus, in Swiss law confidentiality is safeguarded by those articles in any and all forms of mediation as regards the mediator as well as the parties.[490]

3.2.5 Conclusion of the Swiss Position

Swiss law does not distinguish between "domestic dispute mediation" and "cross-border dispute mediation", so the conclusion drawn about the domestic law of Switzerland (above

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[484] Kumpan, Bauer-Bulst, 1209.

[485] Art. 62 I and Art. 213 Code on Civil Procedure.

[486] Swiss Federal Act on Private International Law, Art. 148.

[487] Swiss Code on Civil Procedure, Art. 216 I.

[488] Ibid., Art. 216 II.

[489] Ibid., Art. 166 I d.

[490] Kumpan, Bauer-Bulst, 1222.

under 2.3.4) is also valid for the law of cross-border dispute mediation under Swiss law, as Switzerland follows a "monistic approach" regarding the legislation of mediation.

It has already been stated that the chronological development of the Swiss Code on Civil Procedure mirrors that of Directive 2008/52/EC. After examining the Swiss law of cross-border dispute mediation against the structure and the standards set by Directive 2008/52/EC,[491] it can additionally be stated that the content of the Swiss regulations would match the requirements set by Directive 2008/52/EC. In Switzerland it is possible for parties to request that the content of a written agreement resulting from (any) mediation be made enforceable. The relevant issues regarding the Quality of (any) Mediation are ensured, the statute of limitations can be suspended, and the confidentiality of (any) mediation is safeguarded.

3.3 Comparison

Regarding the agreements in connection with mediation, it can be summarized that in an international context those agreements in Germany, Scotland and Switzerland as well, usually are governed by the law determined by international conventions/supranational regulations.

In Germany and Scotland usually the Rome I Regulation determines the applicable law with the result, that, in general, the law shall be "chosen by the parties"[492] or in absence of such a choice "the law of the country with which (the agreement) is most closely connected" shall apply.[493] In Swiss law, where no international convention regulates the concrete subject matter, the applicable law in international disputes is determined by the IPRG [494] and thus the agreements in connection with mediation are principally also determined by the law chosen by the parties[495] or in absence of such a choice by the law of

[491] Directive 2008/52/EC, Article 4-8.

[492] Rome I Regulation, Article 3 No. 1.

[493] Rome I Regulation, Article 4 No. 4.

[494] Swiss Federal Act on Private International Law, Art. 1 No. 1 (b).

[495] Ibid., Art. 116 No. 1.

the state to which the agreement is most closely connected.[496] In summary, the Rome I Regulation (for Germany and Scotland) or the Swiss IPRG usually will lead to the same results regarding the law to govern the agreements in connection with cross-border dispute mediation.

Each legal system examined has instruments to make (cross-border) mediation agreements enforceable. Within the European Union, (i.e. in Germany and Scotland), enforceable instruments of one Member State are generally enforceable within the whole European Union (under certain requirements).[497] Similarly the Swiss IPRG claims that enforceable foreign instruments are generally recognized in Switzerland and can be made enforceable.[498] With regard to international conventions all states examined are party to the New York Convention, to the (new) Lugano Convention and the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

Quality of mediation in each of the legal systems examined is, in practice, ensured by mediation organisations. Neither in Scotland nor in Switzerland (in general at least on a federal level), nor in Germany are there any formal requirements and accreditations mandatory for mediators. In contrast to Scottish or Swiss law, the German Mediation Act requires an adequate education for mediators, which thus is formally mandatory, but too vague to proof the requirements, so in practice in each of the examined countries any foreign mediator may act as a mediator in a cross-border dispute.

In each legal system examined it is possible to avoid statutory limitation while mediating, and equally each state safeguards the confidentiality of (cross-border dispute) mediation. Germany safeguards confidentiality of mediation in general, [499] Scotland safeguards

[496] Swiss Federal Act on Private International Law, Art. 117 No. 1.

[497] c.f. Article 6, Regulation (EC) No 805/2004 of the European Parliament and of the Council, 21.04.2004 and Article 58 (1), Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), former Article 57 (1), Council Regulation (EC) No 44/2001, 22.12.2000 and Article 23, Council Regulation (EC) 4/2009, 18.12.2008.

[498] Swiss Federal Act on Private International Law, Art. 25, 28, 30 and 31.

[499] German Mediation Act, Section 4.

confidentiality only of cross-border mediation,[500] and Switzerland safeguards confidentiality of mediation in connection with court proceedings.[501]

3.4 Conclusion

In summary Germany and Scotland are subject to the direct influence of Directive 2008/52/EC and thus have transposed its requirements into national law. In Switzerland, Directive 2008/52/EC does not apply, but in any event Switzerland recently passed a national law matching the requirements of Directive 2008/52/EC. In consequence the content of the regulations in the three legal systems are very similar.

The main difference between those legal systems lies in the material scope of application of the regulations. Germany transposed Directive 2008/52/EC into national law valid for domestic dispute mediations as well as for cross-border dispute mediation and thus chose the "monistic approach". In contrast, Scotland implemented Directive 2008/52/EC only in regard to cross-border disputes, i.e. those (new) regulations only apply for "cross-border disputes" by definition of Article 2 of Directive 2008/52/EC, and thus chose the "dualistic approach". Switzerland again is entirely unaffected by any distinction between domestic dispute mediation and cross-border dispute mediation, and all Swiss regulations are equally valid for any mediation. Thus Switzerland adopted the "monistic approach".

Chapter 4: Comparison of Domestic Dispute Mediation with Cross-border Dispute Mediation

So far this thesis has separately compared the legal landscapes of domestic dispute mediation in the legal systems examined, and the legal landscapes of cross-border dispute mediation in the legal systems examined. Thus, a comparison of the legal landscapes of domestic dispute mediation with the legal landscapes of cross-border dispute mediation within the same legal systems is missing.

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[500] cf. Regulation 3 (1) of the Cross-Border Mediation (Scotland) Regulations 2011.

[501] Swiss Code on Civil Procedure, Art. 166 and Art. 216.

4.1 Monistic Approach

"Monistic approach" in this thesis denotes any legislation dealing not only with cross-border disputes, but regulating simultaneously both domestic disputes and cross-border disputes.[502] In other words, the monistic approach is the equal treatment of cross-border disputes and domestic disputes. Thus, there are no differences between the legal landscapes of domestic dispute mediation and of cross-border dispute mediation in the States which chose the monistic approach (which in this thesis are Germany and Switzerland).

A benefit of the monistic approach is the higher level of harmonization of the rules on mediation between domestic disputes and cross-border disputes, so parties can rely on a predictable legal framework valid for any mediation, no matter where the other party is domiciled.

4.2 Dualistic Approach

"Dualistic approach" in this thesis denotes any legislation solely concerning mediation of cross-border disputes and not regulating domestic disputes.[503] Thus, the result of this dualistic approach may be a different treatment of mediation of cross-border disputes, and domestic disputes, respectively.

Scotland (partly) implemented Directive 2008/52/EC by the Cross-Border Mediation (EU Directive) Regulations 2011.[504] These Regulations apply only in respect of mediations relating to cross-border disputes[505] in the meaning given by Directive 2008/52/EC,[506] and do not extend to domestic disputes.[507] Thus, by this dualistic approach there might be

[502] Esplugues, Volume II, 546 et seq.

[503] Esplugues, Volume II, 546 et seq.

[504] cf. Explanatory Note to the Cross-Border Mediation (EU Directive) Regulations 2011, SSI 2011 No. 234.

[505] cf. The Cross-Border Mediation (EU Directive) Regulations 2011, SSI 2011 No. 234, Part 1 No. 8 (i).

[506] Ibid., No. 8 (b).

[507] cf. Explanatory Memorandum to the Cross-Border Mediation (EU Directive) Regulations 2011, SI 2011 No.1133, 4.2.

differences between the regulations of domestic dispute mediation and cross-border dispute mediation in Scotland.

To identify these differences, the Scottish implementation of the strict mandatory standards set by Directive 2008/52/EC[508] has to be compared to the Scottish domestic regulations regarding the same issues.

4.2.1 Quality of Mediation

By Directive 2008/52/EC, "Member States shall encourage, by any means which they consider appropriate" [509] mechanisms to ensure the quality of (cross-border dispute) mediation. The requirements of Directive 2008/52/EC about the quality of mediation are really neither strict nor measurable and "the pre-existing arrangements in Scotland already complied with (those requirements)". [510] Therefore, regarding the issue of quality of mediation, no further implementation took place in Scotland and thus Directive 2008/52/EC had no influence on those Scottish regulations and did not cause differences between domestic disputes and cross-border disputes.

4.2.2 Enforceability of Agreements resulting from Mediation

Directive 2008/52/EC provides in article 6 (1) that "Member States shall ensure that it is possible…to request that the content of a written agreement resulting from (cross-border) mediation be made enforceable." The "pre-existing arrangements in Scotland (also) already complied with (those requirements)",[511] as there may be the possibility to register the mediation settlement for preservation and possibly execution in the Books of Council and Session of Scotland or settle the agreement in form of tribunal's award and thus make it enforceable in a national (as examined above under 2.2.1.3) or an international context (as examined above under 3.1.1.3). Likewise, regarding the issue of enforceability of

[508] Directive 2008/52/EC, Article 4-8.

[509] Ibid., Article 4.

[510] Crawford, Carruthers, Volume I, 526.

[511] Ibid.

agreements resulting from mediation, no further implementation took place in Scotland and thus Directive 2008/52/EC had no influence on those regulations. Neither the national nor the international regulations distinguish between domestic dispute mediation settlements or cross-border dispute mediation settlements, so there are no differences between them.

4.2.3 Effect of Mediation on Limitation and Prescription Periods

Furthermore, by Directive 2008/52/EC, "Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process."[512]

Regarding domestic dispute mediation, while mediation is attempted, "judicial proceedings may be temporarily suspended at the request of the parties",[513] but this means just "a party to legal proceedings". [514] In contrast, Scotland implemented Article 8 of Directive2008/52/EC by amending prescription and limitation periods in primary legislation, mainly in the Prescription and Limitation (Scotland) Act 1973.[515] Thus, an imminent expiration of a prescription or limitation period during a cross-border mediation will be extended until eight weeks after the end of that mediation without prejudicing the possibility to go to court.[516] Those implementations are only relevant for cross-border dispute mediations, not for domestic dispute mediations.[517]

One can see differences in the legal background of domestic dispute mediations and cross-border dispute mediations in Scotland regarding the topic of limitation and prescription

[512] Directive 2008/52/EC, Article 8 (I).

[513] cf. Crawford and Carruthers, *United Kingdom I*, 533, referring to: Arbitration (Scotland) Act 2010, 5th January 2010, Suspension of legal proceedings, Rule 10 Suspension of legal proceedings, 10 (1).

[514] Ibid., 10 (1).

[515] cf. Crawford and Carruthers, *United Kingdom I*, 528, referring to: Regulation 4 of the Cross-Border Mediation (Scotland) Regulations 2011.

[516] cf. Regulation 5 and 6 of the Cross-Border Mediation (Scotland) Regulations 2011.

[517] Ibid., Regulation 5 (3) b and 6 (4).

periods, especially in the scope of application of the regulations. The general protection against an imminent expiration of a prescription or limitation period during any cross-border dispute mediation is much more extensive than the lower level of protection as regards domestic dispute mediation (as examined above under 2.2.2). Thus it may depend on the (sometimes non-transparent) domicile or habitual residence of the parties, whether a prescription or limitation period expires or not, and parties of a cross-border dispute may have an advantage over those of a domestic dispute.

4.2.4 Confidentiality of Mediation

Directive 2008/52/EC also provides that (generally) "Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process",[518] unless the parties agree otherwise (or where there is a relevant exception mentioned in Article 7 (1) of Directive 2008/52/EC).

As regards domestic dispute mediation (except in family mediations)[519] confidentiality in Scotland is "not currently guaranteed by any legislation".[520] Regarding cross-border dispute mediations, (generally) "a mediator of, or a person involved in the administration of mediation in relation to, a relevant cross-border dispute is not to be compelled in any civil proceedings or arbitration to give evidence, or produce anything, regarding any information arising out of or in connection with that mediation,"[521] unless the parties agree otherwise (or where there is a relevant exception mentioned in Article 7 (1) of Directive 2008/52/EC). Thus, Scotland safeguards confidentiality only concerning "relevant cross-border disputes", whereas confidentiality of domestic mediation generally is not guaranteed by any legislation.

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[518] Directive 2008/52/EC, Article 7 (I).

[519] Civil Evidence (Family Mediation) (Scotland) Act 1995, Chapter 6.

[520] Tuddenham, No. 5c.

[521] cf. Regulation 3 (1) of the Cross-Border Mediation (Scotland) Regulations 2011.

Again, one can see differences in the level of protection. The general protection of confidentiality of cross-border mediation is much more extensive than the (nearly) missing protection as regards domestic dispute mediation. Thus it may again depend on the domicile or habitual residence of the parties whether confidentiality is protected or not.

In summary, in Scotland, where Directive 2008/52/EC had to be implemented, this caused differences between the legal landscapes of domestic and cross-border mediations. As parties sometimes might not even be aware of having a domestic dispute or a cross-border dispute (e.g. where the statutory seat of a legal person is not transparent), they cannot rely on a predictable legal framework determining the concrete mediation.

Chapter 5: Conclusion

This final chapter will give a short review of the previous chapters and summarize the results. An evaluation of the different approaches will be carried out to answer the questions whether Directive 2008/52/EC would have better harmonized the rules on mediation in Europe without drawing the distinction between internal and cross-border disputes and whether Directive 2008/52/EC in its current form was an appropriate legislative tool to regulate mediation.

5.1 Review

The European Parliament and the Council created Directive 2008/52/EC including mandatory standards on certain aspects of mediation[522] to harmonize the set of rules on mediation.[523] This directive applies only in cross-border disputes,[524] but the European Parliament and the Council explicitly announced that “nothing should prevent Member

[522] Directive 2008/52/EC, Article 4-8.

[523] Esplugues, Volume II, 510.

[524] Directive 2008/52/EC, Article 1 (2).

States from applying …(the)… provisions (of Directive 2008/52/EC) also to internal mediation processes."[525]

It has been shown that there are two different approaches, the "monistic approach" on the one hand, and the "dualistic approach" on the other. These differences in the approaches and the differences this probably caused in the legislation, led to the hypothesis that *Directive 2008/52/EC would have better harmonized the rules on mediation in Europe if it had not drawn the distinction between internal and cross-border disputes.* In other words, if there were fewer differences in the rules on mediation in Europe without the distinction between internal and cross-border disputes drawn by Directive 2008/52/EC, there would be a higher level of harmonization.

To research this hypothesis, first the domestic laws of mediation in Germany, Scotland and Switzerland were examined. This led to the result that there are obvious differences in the source of the regulations of domestic dispute mediation between those legal systems, e.g. who made the regulations and how binding they are. Additionally, the examination of the domestic laws of mediation led to the result that in Germany the legal framework also of domestic dispute mediation changed with the implementation of Directive 2008/52/EC. In contrast, the legal landscape of domestic dispute mediation did not change with the implementation of Directive 2008/52/EC in Scotland. In conclusion, by the implementation of Directive 2008/52/EC with the monistic approach, Directive 2008/52/EC also has an impact on the legal landscape of domestic dispute mediation. In Switzerland, the legal landscape of domestic dispute mediation also changed with the new Swiss Code on Civil Procedure (which was no implementation of Directive 2008/52/EC). Generally, any change in the legislation of mediation by a monistic approach also has an impact on the legal landscape of domestic dispute mediation.

Then the laws of cross-border dispute mediation in Germany, Scotland and Switzerland were examined (with regard to the mandatory standards set by Directive 2008/52/EC, noting, of course, that this directive does not apply in Switzerland), leading to the result, that again there are obvious differences in the legal manifestation of the regulations of cross-border dispute mediation among those legal systems. This time those differences lie in the material scope of application of the regulations. The regulations of Germany and Switzerland do not only deal with cross-border disputes, but also domestic disputes,

[525] Directive 2008/52/EC, Recital (8).

whereas in Scotland legislation has been introduced to implement Directive 2008/52/EC solely concerning cross-border dispute mediation. So the differences exactly lie in the two different approaches, the “monistic approach” on the one hand and the “dualistic approach” on the other.

At last the domestic legislation of mediation was compared to the cross-border legislation of mediation within the same legal system, leading to the result that there are no differences between those two types of mediation within the states which chose the monistic approach, whereas such differences can be seen within Scotland which chose the dualistic approach. There are no differences in Scotland, too, regarding the issues where no implementation of Directive 2008/52/EC took place, but regarding the issues where implementation was required, this was (mainly) done by regulations which apply only to cross-border mediations and thus cause differences between domestic and cross-border mediations.

In summary, there currently are differences in the approaches, differences in the impact of Directive 2008/52/EC on the legal framework of domestic dispute mediation, differences in the source of the regulations of domestic dispute mediation, differences in the material scope of application of the regulations of cross-border dispute mediation and differences between the legal landscapes of domestic and cross-border mediations within Scotland.

5.2 Hypothetical Development

There might not be these current differences if Directive 2008/52/EC had not drawn the distinction between internal and cross-border disputes, i.e. if it had not been restricted in its scope of application to cross-border disputes.

1. Differences in the approaches:

A development without being influenced by the distinction between domestic and cross-border disputes drawn by Directive 2008/52/EC was shown by the example of Switzerland, which therefore indeed does not distinguish between domestic dispute and cross-border dispute and thus follows a monistic approach. Similarly, before being influenced by the distinction drawn by Directive 2008/52/EC, the previous regulations in Scotland did not make this distinction either. Furthermore, the current Scottish regulations which were not

changed by any implementation do still apply to any mediation. The dualistic treatment of mediation in Scotland was caused by the implementation of Directive 2008/52/EC with the distinction between internal and cross-border disputes. So without this distinction Scotland would (still) also follow a monistic approach. In consequence, it can be assumed that jurisdictions throughout the European Union would equally not distinguish between domestic dispute and cross-border dispute if Directive 2008/52/EC had not drawn this distinction. Thus, the approach to regulate mediation would (only) be monistic and therefore there would be no differences in the approaches. The monistic approach has the benefits of making the legal framework more predictable for parties because the rules which determine the concrete mediation do not depend on the (sometimes non-transparent) domicile or habitual residence of the parties.

2. Differences in the impact of Directive 2008/52/EC on the legal landscape of domestic mediation:

Germany implemented Directive 2008/52/EC by the monistic approach, which would be the only approach without the distinction between domestic and cross-border disputes. Thereby, in Germany, Directive 2008/52/EC also had an impact on the legal landscape of domestic mediation. However, this example can not be generalized as Germany did not have regulations about mediation at all before Directive 2008/52/EC and thus had to implement the Directive. In contrast, Member States may already have had regulations in accordance with Directive 2008/52/EC and thus would not need to especially implement Directive 2008/52/EC. Then the Directive would not have an impact on the legal landscape of domestic mediation in this case. So generally differences in the impact of Directive 2008/52/EC on the legal landscape of domestic mediation could still remain if the Directive had not drawn the distinction between internal and cross-border disputes.

3. Differences in the source of the regulations of domestic mediation:

This thesis worked out differences in the source of the regulations of domestic dispute mediation between the legal systems examined. For the purpose of a comprehensive review, not these concrete differences have to be concentrated on, but differences in the source of regulations in general. If Directive 2008/52/EC was also binding for domestic dispute mediation, it would (still) leave “to the national authorities the choice of form and

methods".[526] So even if Directive 2008/52/EC was also binding for domestic dispute mediation, differences in the source of regulation could still remain.

4. Differences in the material scope of application of the regulations of cross-border mediation:

If Directive 2008/52/EC was binding for cross-border dispute mediation and domestic dispute mediation, all regulations about mediation would apply to any mediation and there would be no differences in the material scope of application of those regulations.

5. Differences between the legal framework of domestic and cross-border mediations within the same state:

If there was only the "monistic approach", there would be no differences between the legal landscapes of domestic dispute mediation and cross-border dispute mediation within the same state.

In summary, this thesis showed current differences in the rules on mediation in Europe. This thesis also showed that there would be fewer such differences if Directive 2008/52/EC was binding for cross-border dispute mediation and domestic dispute mediation. Thus, the hypothesis is verified:

Directive 2008/52/EC indeed would have better harmonized the rules on mediation in Europe if it had not drawn the distinction between internal and cross-border disputes.

5.3 Extended Application of Directive 2008/52/EC

In consequence, the question appears why Directive 2008/52/EC was not created without restriction in its mandatory application only to cross-border disputes.

When Directive 2008/52/EC was created, the European Union based its competence on Article 61 (c) of the Treaty establishing the European Community, which claimed that "the Council shall adopt measures in the field of judicial cooperation in civil matters as

[526] Treaty on the Functioning of the European Union, Article 288.

provided for in Article 65". Article 65 only provides "measures in the field of judicial cooperation in civil matters having cross-border implications…".[527] Thus, the European Union only had competence to regulate measures having cross-border implications, and was not able to extend the mandatory application of Directive 2008/52/EC also to domestic disputes.

Nevertheless, even if Directive 2008/52/EC had better harmonized the rules on mediation in Europe, if it had not drawn the distinction between internal and cross-border disputes, the Directive might be said to be appropriate in its current form anyway.

There are benefits from leaving the choice to the Member States to regulate both internal and cross-border disputes. Even among Member States that (voluntarily) chose the monistic approach there are differences and exceptions in the concrete implementations.[528] In France, for example, the "implementation of Directive 2008/52/EC creates a monistic legal regime, subject to…exceptions" (e.g. "in disputes arising in connection with an employment contract").[529] Generally, "specific issues or areas of law can strongly affect the practical implementation".[530] Thus, it is beneficial for each Member State to have a free choice not to apply the provisions of Directive 2008/52/EC also to domestic disputes, if "specific issues or areas of law"[531] require too much exception to a homogeneous implementation.

Furthermore, the legislative tool of a Direction is appropriate, although the European Parliament and the Council could have chosen any legislative tool of Article 288 of the Treaty on the Functioning of the European Union to regulate the topic of mediation.[532] A regulation could also have been chosen which "shall be binding in its entirety and directly applicable in all Member States".[533] Thus the difference in the types of source and the

[527] Article 65 of the Treaty establishing the European Community.

[528] Esplugues, Volume II, 547.

[529] cf. E. Guinchard, *France*, in: Esplugues, Carlos (ed.), Civil and commercial Mediation in Europe, Cross-Border Mediation, Volume II, (Cambridge 2014), 144.

[530] Esplugues, Volume II, 547.

[531] Ibid.

[532] A. Staudinger and S. Leible, *Art. 65 EGV im System der EG-Kompetenzen*, in: The European Legal Forum, (D) 4-2000/01, (München 2001), 233.

[533] Treaty on the Functioning of the European Union, Article 288.

material scope of the cross-border dispute mediation regulations between the Member States would have been avoided. But without the duty to implement a Directive, presumably most states would not actively have changed their legislation on domestic dispute mediation. In contrast, actually "a broad number of Member States have accepted the 2008 Directive`s invitation to regulate both, internal and cross-border disputes."[534] (e.g. Bulgaria, Croatia, Cyprus, Estonia, France, Germany, Lativa, Lithuania, Luxembourg, Malta, Portugal, Slovakia, Slovenia, Spain and Sweden)[535] Thus, the Directive in practice also had an (harmonizing) effect on the legislation on domestic dispute mediation, so it was beneficial to choose this legislative tool.

5.4 Result

Although Directive 2008/52/EC would have better harmonized the rules on mediation in Europe if it had not drawn the distinction between internal and cross-border disputes, the Directive in its current form is an appropriate way to regulate mediation in Europe.

On the one hand this Directive is strict enough to create a widely "harmonized set of rules on mediation …"[536] so that "parties having recourse to mediation can rely on a predictable legal framework"[537] at least as regards cross-border dispute mediation, but in several Member States additionally as regards domestic dispute mediation.

On the other hand this Directive leaves a free choice to the Member States not to apply its provisions also to domestic disputes and thus respects the autonomous handling of "specific issues or areas of law"[538] of each State.

Directive 2008/52/EC in its current form is an appropriate symbiosis of the opposing interests of harmonization and specification.

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[534] Esplugues, Volume II, 546.

[535] Ibid..

[536] Ibid., 510.

[537] Directive 2008/52/EC, Recital (7).

[538] Esplugues, Volume II, 547.

Appendix

(Articles of)

DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 21 May 2008

on certain aspects of mediation in civil and commercial matters

Article 1 - Objective and scope

1. The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

2. This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).

3. In this Directive, the term 'Member State' shall mean Member States with the exception of Denmark.

Article 2 - Cross-border disputes

1. For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:

(a) the parties agree to use mediation after the dispute has arisen;

(b) mediation is ordered by a court;

(c) an obligation to use mediation arises under national law; or

(d) for the purposes of Article 5 an invitation is made to the parties.

2. Notwithstanding paragraph 1, for the purposes of Articles 7 and 8 a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.

Article 3 - Definitions

For the purposes of this Directive the following definitions shall apply:

(a) ‘Mediation’ means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.

(b) ‘Mediator’ means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

Article 4 - Ensuring the quality of mediation

1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.

2. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

Article 5 - Recourse to mediation

1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.

2. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

Article 6 - Enforceability of agreements resulting from mediation

1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

3. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 2.

4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.

Article 7 - Confidentiality of mediation

1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.

Article 8 - Effect of mediation on limitation and prescription periods

1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.

2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party.

Article 9 - Information for the general public

Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.

Article 10 - Information on competent courts and authorities

The Commission shall make publicly available, by any appropriate means, information on the competent courts or authorities communicated by the Member States pursuant to Article 6(3).

Article 11 - Review

Not later than 21 May 2016, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive. The report shall consider the development of mediation throughout the European Union and the impact of this Directive in the Member States. If necessary, the report shall be accompanied by proposals to adapt this Directive.

Article 12 - Transposition

1. Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011, with the exception of Article 10, for which the date of compliance shall be 21 November 2010 at the latest. They shall forthwith inform the Commission thereof.

When they are adopted by Member States, these measures shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 13 - Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 14 - Addressees

This Directive is addressed to the Member States.

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